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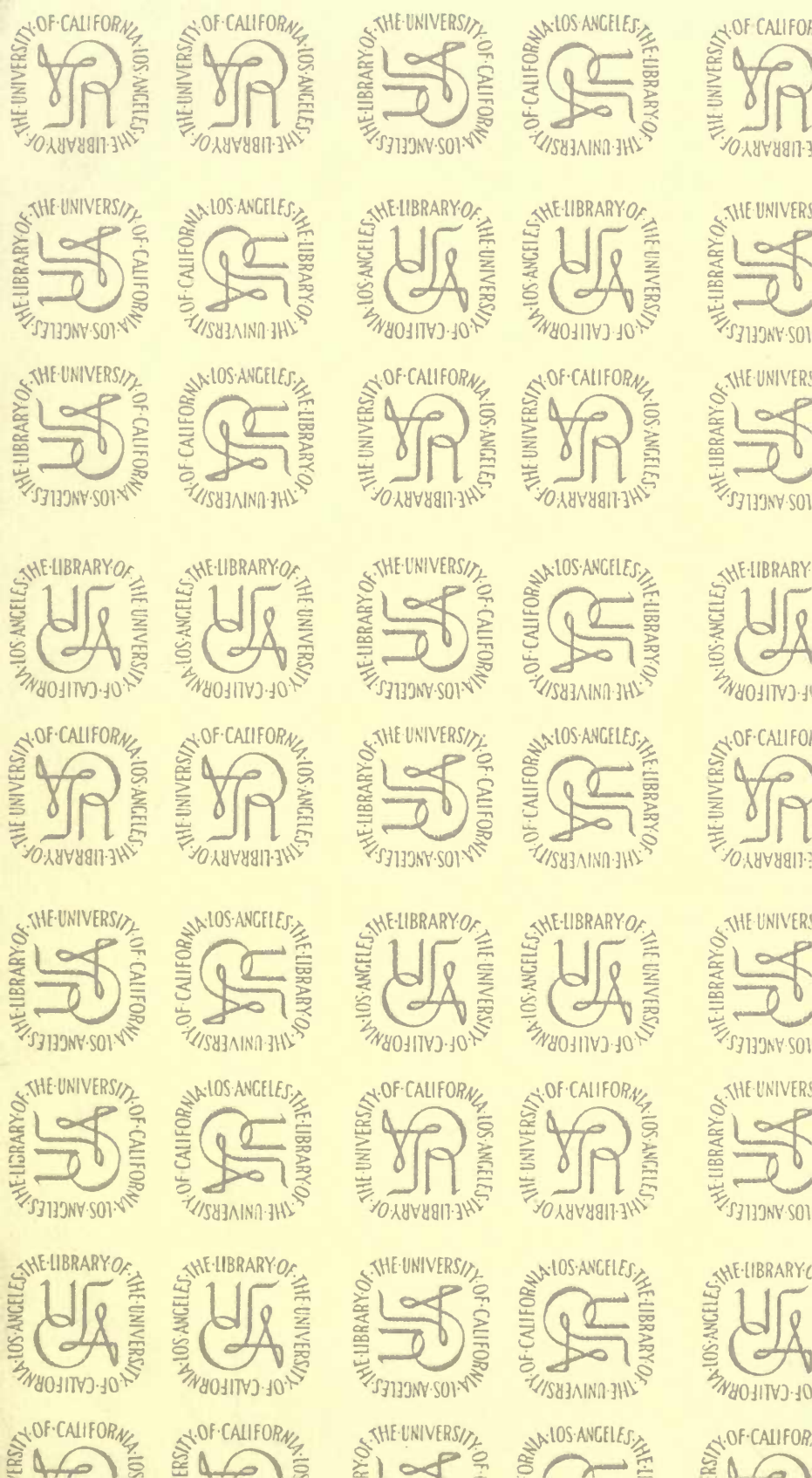
THE LIBRARY OF THE UNIVERSITY OF CALIFORNIA LOS ANGELES

A

TREATISE

ON

THE ORIGIN AND NATURE

OF

DIGNITIES,

OR

Titles of Honor;

CONTAINING

ALL THE CASES OF PEERAGE, TOGETHER WITH THE MODE OF PROCEEDING IN CLAIMS OF THIS KIND.

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SECOND EDITION,
REVISED AND ENLARGED.

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PREFACE.

No part of the English law has been so little discussed as that of DIGNITIES, or TITLES of HONOR; nor has any systematic arrangement of that subject been published in modern times.

In Dugdale's Baronage the pedigrees of all the ancient nobility are traced from authentic records, with infinite labor and industry; but of the origin and nature of dignities, little can be collected from that work.

Mr. Selden, indeed, has left us a most learned treatise on titles of honor. He appears, however, to have paid more attention to the dignities of foreign countries, than to those of his own.—As far as he has investigated the subject of English titles, he has displayed profound learning; but it was not until after the publication of his work, that the chief points of law respecting the nature and descent of dignities by writ, were finally established.

Collins's Proceedings concerning Baronies by Writ, is a book of considerable utility, as it contains most of the cases respecting dignities, from the latter end of the reign of queen Elizabeth to the year 1740;

but they are not arranged under heads, nor does that work contain any general principles.

As claims to ancient dignities are now become so numerous, the Author of the following Tract had formed a plan for collecting all the printed cases that have been presented to the house of peers, on claims of this nature; and having succeeded in this point, chiefly by the assistance he derived from the collection of printed cases of the late Mr. Serjeant Hill, which is now in the library of Lincoln's Inn, it struck him, that to render such a work complete, it would be necessary to add to each case the report of the attorney general, together with such circumstances respecting the grounds on which the house of peers founded its resolutions, as might be collected from the minutes of the committee of privileges.

This could only be done with the permission of the house of peers: but from the laudable disposition which now prevails to publish all such records as tend in any way to illustrate the laws and constitution, there can be no doubt but that every thing proper and fit to be made public, from the archives of the house, would have been allowed.

There was, however, another circumstance to be attended to. A work of this nature, from its extent, as well as the vast size of several of the pedigrees annexed to the cases, could only be printed in a large folio, and at a considerable expense, Now as the sale of such a book must be very limited, a loss would

probably be occasioned, greater than any private individual could be expected to incur.

For these reasons, the plan of publishing a collection of printed cases has been abandoned, and in its stead the following Tract is offered to the house of peers, and the profession of the law; in which will be found a systematic arrangement of the law respecting dignities or titles of honor, supported and illustrated by a short statement of all the cases on claims to peerages, that have been referred either to commissioners or to the house of peers, from the reign of queen Elizabeth to the present time; together with a chapter respecting the jurisdiction, and mode of proceeding, in claims of this kind.

This Edition has been carefully revised, and considerably enlarged; and the cases of the earldoms of Banbury and Airlie, in which very important questions of law have been discussed, are here inserted.

Albany, 1823.

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A

TREATISE

ON

DIGNITIES,

OR

TITLES OF HONOUR.

CHAPTER I.

ORIGIN OF DIGNITIES, AND NAMES OR TITLES THEREOF.

§ 1. *Feudal Dignities.*
7. *Dignities in France.*
18. *Dignities in Normandy.*
23. *Origin of English Nobility.*
24. *The Curia Regis.*
28. *Origin of Parliaments.*
34. *How first composed.*
§ 41. *Barones Majores et Minores.*
43. *Necessity of a Writ of Summons.*
50. *Title of Baron.*
55. *Title of Earl.*
59. *Title of Duke.*
61. *Title of Marquis.*
66. *Title of Viscount.*

SECTION I.

Feudal dignities.

THE Dignities or Titles of Honor which now exist in England, derive their origin from the feudal institutions, and were first introduced into this country by the Normans.

All the feudal writers agree, that, where a tract of land was granted by a sovereign prince to one of his followers, to be held immediately of himself, by military or other honorable services, with a jurisdiction, it was called a *feudum nobile*, and conferred nobility on the person to whom it was granted.

§ 2. Where a title of honor was annexed to a *feudum nobile*, it was called *feudum dignitatis*; and all feudal sovereigns claimed and exercised the right of erecting a particular tract of land into a *feudum dignitatis*, by annexing to it a dignity, or title of honor.

Lib. 2. tit. 10. Thus it is said in the *Liber Feudorum*: — *Qui a Principe de ducatu aliquo investitus est, dux solito more vocatur. Qui vero de marchia, marchio dicitur. Qui vero de aliquo comitatu investitus est, comes appellatur.* From which it appears that the feudal dignities were those of duke, marquis, and earl, and were not mere personal distinctions, but annexed to lands.

Lib. 1. tit. 10. s. 12. § 3. *Nobile autem feudum*, (says Craig,) *vocant in jure, quod a Principe, qui superiorem non agnoscit, conceditur. Veluti a Cæsare, pontifice maximo, vel regibus. Ego autem hic aliquam distinctionem esse adhibendam puto; ut nempe ea tantum feuda a principe concessa nobilitant, quæ cum dignitate et jurisdictione conceduntur. Qualia sunt ducatus, marchionatus, comitatus, baroniæ. His enim dignitas et jurisdictio inhæret, itaque cum ipso titulo nobilitas concessa videtur. Nobilitare enim nihil aliud est quam nobilem, id est, præclarum illustrum et perspicuum plebi reddere, et lucem adferre; ut ab omnibus talis, qualis a Principe constituitur, agnoscatur.*

§ 4. Estates of this kind were also called *feuda imperatoria seu regalia*, of which Sir Henry Spelman gives the following account: —

Gloss. voce Feudum. *A solo Imperatore vel Rege, sub ducatus, marchionatus comitatus, vel illustri alio titulo, sunt collata. Tenenturque ideo a solo Imperatore vel Rege, immediaté. Et dicuntur eorum possessores regni vel imperii capitanei, quia in capite tenent, hoc est a rege vel Imperatore vel Principe. Dicuntur præterea dignitates regales, quod regni splendoris radios quosdem obtinent; fruebanturque olim juribus plerumque regalibus.*

§ 5. The dignity of baron is not mentioned in the *Liber Feudorum*; but appears to have been introduced after the publication of that work. It is, however, clearly feudal; and is thus described by Spelman: —

Galli, Germani, Itali, feudistarum amplectens definitionem, è Baldo petitam, baronem vocant qui merum mistumque imperium

habet in aliquo castro, ex concessione Principis, vel ut alii loquuntur, summæ mediæ et infimæ jurisdictionis; jus in arce quadam, a principe concessam.

§ 6. By the feudal law dignities were transferable with the feuds to which they were annexed; so that if an estate, which had been erected into a duchy or marquisate, was sold with the consent of the feudal lord, the purchaser acquired the dignity, as well as the estate.

§ 7. All dignities in France were feudal, and annexed to those lands over which the proprietor had a jurisdiction, which were called *Seigneuries.* Thus, Loyseau, an eminent French lawyer, who wrote in the sixteenth century, says— Dignities in France.

"*La seigneurie est proprement attribuée et inherente au fief, et indirectement communiquée à la personne qui le possède. C'est pourquoi aux livres de fief, quand on demande, Quis dicitur dux, marchio, aut comes? on répond que c'est celui, Qui de ducatu, marchia, aut comitatu, investitus est: ce qui montre bien que le titre et dignité de duché, marquisat, et comté, reside proprement au fief. J'ai dit du fief ayant justice, parce qu'une terre roturière ne peut être seignurie, ny avoir justice. Que si la justice vient d'être concedée à un Franc aleu, il devient noble à cette occasion; parceque toute terre qui est en dignité est noble.*" Traité des seignuries, c. 4.

§ 8. About the time of the Norman conquest, the nobility of France appear to have been divided into three classes. The *seigneur châtelain*, the baron, and the count.

The *seigneur châtelain* was a person possessed of a feudal *seigneurie*, held immediately of the crown, to which was annexed a right of administering justice in civil cases; and of erecting a *château*, or fortified house. *Castellanus est dominus territorii, qui imperium habet, et jurisdictionem. Qui castellum habet.* Ragueau Glossaire.

§ 9. The baron was a person possessed of a *seigneurie* held immediately of the crown, with a right of administering justice in civil and criminal cases; and the estate thus held was called a *baronie.*

Une baronie est une terre (says Ragueau,) *où il y a toutes justices; ce que a fait dire à Balde, que tout homme à qui le* Id.

Prince a donné merum mistumque imperium, peut prendre le titre de baron, et l'auteur du Grand Coustumier de France écrit pareillement, que tout homme qui a haute justice en ressort, se peut nommer baron.

§ 10. The word *baro* was originally synonymous with *homo*, as appears from a passage in the *Lex Ripuariorum*, and another in the *Lex Alamanorum*.* Therefore, the kings of France, instead of calling their immediate vassals *homines*, gave them the appellation of *barones*; and the whole body of the nobility was called *le baronage*.

§ 11. The author of the *Grand Coustumier de France* says, there were originally but three baronies in France—Bourbon, Beaujou, and Coucy; though other writers add the barony of Montmorency, which was reputed the first. In the reign of Philip Augustus, *anno* 1180, there were fifty-nine baronies. This, however, is accounted for by observing that formerly none were accounted barons except those who held by an immediate grant from the crown. But that, in course of time, those who held baronies of the king, as sovereign of the several *duchys* and *comtés* which became annexed to the crown of France, were reputed king's barons.

Loyseau, Id. c. 6. s. 7.

§ 12. The title of count was well known in the lower empire, where it was merely officiary. After the settlement of the German nations in the southern parts of Europe, the governors of cities were generally called counts; and when those persons acquired the property of the cities, of which they had only been governors, to be held of the Sovereign as fiefs, the title of count became feudal, and was annexed to the possession of those cities.

§ 13. The count was, therefore, a person possessed of a city, and a considerable territory annexed to it, held immediately of the sovereign, with a right of administering justice in civil and criminal cases, and with various other privileges. His estate was called a *comté*, and his title was superior to that of a baron, as having a larger property.

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* Lex Rip. Tit. 58. No. 12.—*Quod si quis hominem regium tabularium, tam baronem quam feminam, &c.* Lex Alam. Tit. 76.—*Si quis mortandit barum aut feminam, &c.*

§ 14. When the kings of France were disposed to confer a dignity, they erected an estate into a *comté* or *baronic*, and then granted it to the person on whom they meant to confer such dignity. Thus Selden has stated a charter by which Charles VI., king of France, in 1380, erected the castle town, and *châtellenie* of Mortaigne into a *comté*, and granted it to Peter De Navarre, by which he became Count De Mortaigne.

Titles of Honor, Part 2. c. 3. s. 14. edit. 1672.

§ 15. The words of the charter are:—*Et voulons et avons ordonné et decerné, ordonnons et decernons, par ces presents, que doresenavant les dites chatel, ville, et chastellenie, et leurs appurtenances, soient dictes, reputées et appellées comté, et icelle comté, avec ses dites appurtenances, jusque trois mil livres Tournois de terre revenant à present, qui per nos gents et officiers seront estimes et assises en bonnes et convenables assiettes, au plus pres du dit chastel et ville de Mortaigne que faire se pourra, bonnement, et avec telle justice et seigneurie comme ausdits chattel et chastellenie appartient d'ancienneté. Avons donné et octroyé, donnons et octroyons de notre certaine science et grace speciale et de notre plein puissance et authorité royale au dit Pierre de Navarre, notre cousin germain, pour lui, ses heirs et successeurs, à une seule foy et homage, et en noblesse de comté, par telle maniere que il et ses dits heirs et successeurs soient, puissent et doivent être appellés comtes de Mortaigne, et jouir et user de tels droits, prerogatives pre-eminences et libertés et franchises come à comtes appartient, et enjouyssent et usent perpetuellement come leurs propres choses perpetuelment.* And command is given to the Baily of Contentin, or his lieutenant, to put the count into seisin of the county.

§ 16. By an edict of Henry III., king of France, made in 1579, it was declared that no *seigneuries* should be created into new dignities, unless the estate to be erected into a *chatellenie* had civil and criminal jurisdiction, &c.; that a *baronie* should be composed of three *chatellenies* at least, which should be united and incorporated together, to be held of the king by single homage. That a *comté* should have two *baronies* and three *chatellenies* at the least, or one *baronie* and six *chatellenies*, also united and held of the king: and

that a marquisate should be composed of three *baronies* and three *chatellenies* at the least, or two *baronies* and six *chatellenies*, united and held as above.

§ 17. By the old law of France, the acquisition of a *fief de dignité* ennobled the possessor, and gave him a right to the title of honor annexed to such *fief*. But by an ordonnance made at Blois, in 1579, it was declared that the acquisition of a *fief noble* should not confer nobility. And the President Henault observes on this law: — *Il eut été indecent que le peuple, en acquerant les fiefs, eut acquis en même temps les mêmes distinctions que leurs premiers possesseurs. On les réduisit donc à l'avantage d'être propriétaires d'une terre, sans que le titre de cette terre leur devint propre, et alors fut établi le principe que les terres nobles ne rendent pas noble celui que les possède; et qu'un marquisat et un comté, ne fait ni un marquis ni un comte.*

Abrégé de L'Hist. de France, anno 1574.

Dignities in Normandy.

§ 18. The dignities of earl and baron were well known in Normandy at the time of the conquest, and were strictly feudal, being annexed to the possession of lands. Thus, in the 34th chapter of the *Grand Coustumier of Normandy, De Releviis*, is the following passage: — *Unde notandum est quod quædam sunt feuda capitalia quædam subposita. Capitalia sunt quæ in capite tenentur, ut comitatus, baroniæ, et feuda loricæ.**

§ 19. By the 23d chapter, the duke of Normandy is declared to be entitled to the wardship of all minors who held of him, by homage, any barony or *comté*. *Habere etiam debet omnium eorum custodias, qui baronias, comitatus, vel mercatum, vel sergentariam liberam feodatam, quæ nullam inter fratres divisionem debeat sustinere, vel domum vel turrim batillatum, de duce tenent per homagium.*

§ 20. It appears also, from the 53d chapter, that the nobility of Normandy had a jurisdiction over their vassals. — *Milites autem et libere tenentes qui habent comitatus, vel baronias, vel dignitates alias feodales, vel feoda loricæ, vel Francas sergenterias, vel alia Franca feoda ac libera, habeant curias suas*

* This and the following passages are transcribed from the Latin translation of the customs of Normandy, in the black-letter edition, as more intelligible than the Norman French.

de suis residentibus, in simplicibus querelis levibus et grossis mobilium et hereditatum, et de latrocinio, licet per duellum habeant terminari.

§ 21. The practice of creating feudal dignities in Normandy continued long after the conquest, as appears from the following charter of creation of Sir John Gray to be count of Tanquerville, in Normandy, by our Henry V. *Rex omnibus ad quos, &c. Sciatis quod de gratia nostra speciali, et pro bono et gratuito servitio quod dilectus et fidelis noster Johannes de Gray nobis impendit et impendet in futurum, dedimus et concessimus eidem Johanni, comitatum de Tanquerville, cum omnibus suis pertinentiis et dependenciis quibuscunque, quæ tenuerunt et possiderunt infra ducatum nostrum Normaniæ, tam Willielmus de Melhun nuper comes de Tanquerville, quam Jacobus de Harcourt et Margareta uxor ejus, filia prædicti nuper comitis, ut in maritagio cum eadem Margareta; salvis et exceptis terra et baronia de Varegebec in Costentin situatis, habendum et tenendum prefato Johanni et hæredibus suis masculis de corpore suo exeuntibus, de nobis et hæredibus nostris, per homagium, et reddendo unum Basinet' ad castrum nostrum de Rouen, ad festum Sancti Georgii, singulis annis, imperpetuum, &c. Teste rege apud castrum regis de Rouen.* Vincent on Brook. 566.

This Sir John Gray was afterwards called earl of Tanquerville, in Normandy.

§ 22. There was a species of *fief noble* in Normandy, called an honor, to which a dignity was always annexed, as the honor of Homet, the honor of Montpinçon. And in Duchesne's collection of Norman historians, there is a list of the great fiefs in Normandy, in which mention is made of the honor *Montis Fortis*, and the honor *Belli Montis*. Basnage Cont. de Norm. art. 156.

§ 23. Upon the establishment of the Normans in England, the conqueror conferred the estates of such of the Saxon thanes as had fallen in the battle of Hastings, on his principal followers, as strict feuds, to be held immediately of himself by fealty, homage, and military or other honorable services. These were *feuda nobilia*; the persons to whom they were given, became, by such grants, English nobles; and when, about the 20th year of William's reign, the tenure of all the Origin of English Nobility. Hale's Hist. c. 11. Wright's Tenures.

lands in England was declared to be feudal, those who held immediately of the crown, by military or other honorable services, constituted the nobility, or first class of persons in the kingdom.

The Curia Regis.

§ 24. At this period the feudal law was fully established in all the southern part of Europe. William held the duchy of Normandy of the crown of France, as a strict feud; and the only ideas of government which either he or his followers could entertain, must have been purely feudal. Now it was a universal principle of that polity, that the lord should hold a court for the administration of justice to his vassals, and the government of the *seigneurie*, which was composed of himself and his tenants in chief, who were bound by their tenure to attend, and assist him with their advice.

Craig, Lib. ii. tit. 2. c. 10.

Gloss.voce Placitum

§ 25. This service is thus described by Ducange: *Servitium placiti, service de plaids, quod vassallus domino suo feudato debet, cum placita sua, seu assisas tenet, quod sequi et jwvare dominum de placito vocabant. Hinc formula in hominiis, pro prædictis feudis vobis fidelis existam, et fidele servitium faciam, videlicet, guerram et placitum, ad submonitionem vestram, vel cujuslibet nuntii vestri. Vassalli quippe omnes ad ea placita convenire tenebantur.**

§ 26. In conformity to this principle, we find that the first monarchs of the Norman line held a great court in their palaces at Christmas, Easter, and Whitsuntide, which was attended by all their immediate vassals, and was called the *curia regis.*

Hist. of Exch. c. 1. s. 2.

" There (says Madox,) coronations, marriages, and knighthoods of the king's children, were celebrated. There was placed the throne, or sovereign's ordinary court of

* In the kingdom of Lombardy, which was the first feudal government established in Italy, the general assembly of the people was called *placita*, in which the kings were elected, laws were made, and all causes of importance determined.—" *L'assemblée des plaids, à laquelle appartenoit le droit d'élire le souverain, étoit aussi la grande cour de judicature du royaume. C'est de son nom placita que sont venus les mots de plaidoyer, et de plaider. Elle étoit convoquée periodiquement, tout au moins deux fois par année, en été et en automne. Tous les hommes libres, relevant immediatement du roi, étoient tenus d'y assister.* Sismondi Hist. des Res. It. vol. 1. 69.

judicature, wherein justice was administered to the subject, either by the king, or his high justicier. There was the confluence of the nobility and prelates, who used to be near his royal person, and there the affairs of the royal revenue were managed by the king himself, or most usually by his justicier, barons, and prelates employed therein by his command. This may serve for one view of the king's court. To vary the prospect, let us take a view of it in another way; the realm of England was antiently deemed one great seignory or dominion, of which the king was sovereign or chief lord, having under him many barons or great lords, and many knights and military tenants; besides socagers, burgesses, and others. In order to survey the court of this chief lord of the *regnum* or *terra Angliæ*, we may consider him as residing in his palace, and surrounded by his barons and officers of state. The baronage, attending on his royal person, made a considerable part of his court; they were his homagers, they held their baronies of him; he was their sovereign or chief lord; and they were his men, as to life, limb, and earthly honor."

§ 27. This assembly met so regularly at the three great festivals above mentioned, as to be called by our old historians, *curia de more*, or *curia regis de more coadunata*; for which no summons was necessary. But if the king wanted to consult his barons at any other time, he used to send them a summons to attend him on a particular day; and these councils thus meeting by virtue of a summons from the king, are called by *Eadmerus*, *Conventus principum ex præcepto regis*, or *Conventus procerum ex edicto regio*; to distinguish them from the former regular meetings, at the three great festivals.

Origin of Parliaments.

§ 28. The power of feudal sovereigns over their vassals was extremely limited. They had no right to demand any services or duties but those that were expressly reserved upon the investiture of the feud; nor could they levy any money from them, except the three feudal aids:—first, to make the lord's eldest son a knight; secondly, to marry the lord's eldest daughter; and, thirdly, to ransom the lord's person when taken prisoner. Therefore, as to all

things that were extra feudal, the particular consent of the vassals was necessary. Hence, the practice of summoning them to the lord's court, in order to procure their consent to any new measure, which the sovereign might wish to adopt; and particularly to obtain their concurrence to any new tax or imposition, which gave rise to those general assemblies, that in the northern kingdoms were called States General, and in England, Parliaments.

Hist. of Cha. 5. v. i. 43. 8vo.

§ 29. "It was a fundamental principle," says Doctor Robertson, "in the feudal system of policy, that no freeman could be governed or taxed, unless by his own consent. In consequence of this, the vassals of every baron were called to his court, in which they established by mutual consent, such regulations as they deemed most beneficial to their small society; and granted their superior such supplies of money as were proportional to their abilities, or to his wants. The barons themselves, conformably to the same maxim, were admitted into the supreme assembly of the nation, and concurred with the sovereign in enacting laws, or imposing taxes. As the superior lord, according to the original plan of feudal policy, retained the direct property of those lands which he granted in temporary possession to his vassals, the law, even after fiefs became hereditary, still supposed this original practice to subsist; and a baron continued to be considered as the guardian of all who resided within his territories. The great council of each nation, whether distinguished by the name of a parliament, a diet, the cortes, or the states general, was composed entirely of such barons and dignified ecclesiastics, as held immediately of the crown."

§ 30. The *curia regis* was therefore the original of our parliament, though in process of time the general meetings of all the barons, when called together by a summons from the king, acquired the names of *magnum consilium* and *commune consilium regni*; and the appellation of *curia regis* was only applied to that constant and permanent court consisting of the great officers of the crown, which was held in the king's palace, for the administration of justice, and the management of the royal revenue.

§ 31. The duty of attending the *curia regis* conferred a species of dignity on those who were bound to it, by which they came to be considered as a distinct and superior class of persons. They were called peers, from the word *pares*, which, in the feudal law, denoted persons holding of the same lord, under the same tenure, laws, and customs, and with equal privileges. For, in that system, the tenants of every lord, who met together in his court, to determine the disputes arising within his seignory, were called *pares curiæ*. Craig, Lib. 2. Tit. 2. s. 10.

§ 32. Thus we read in Spelman: — *Pares dicuntur qui acceptis ab eodem domino, puta rege, comite vel barone, sive majore sive minori, feudis, pari lege vivunt, et dicuntur omnes pares curiæ quod in curia domini illius, cujus sunt vassalli, parem habent potestatem, scil. Vassalli regis in curia regni; vassali comitis in curia comitatus, vassali baronis, in curia baronis.* Gloss. voce Pares.

§ 33. The same author, in his discourse on parliaments, has the following passage: "Those that thus received their territories from the king, were said to hold them in *capite*, for that the king is *caput regni;* and were therefore called *capitanei regni*, otherwise *barones regis*, the king's men, tenants, or vassals; who, having all the lands divided among them, saving that which the king reserved to himself as *sacrum patrimonium*, were also called *pares regni;* and were always upon commandment about the person of the king, to defend him and his territories in war, and to counsel and advise him in peace; either juridically in matters of law, brought before the king in his palace, which in those days was the only place of royal justice, or politically in the great affairs of the kingdom. Hereupon they were not only called *prætorianum, concilium* as belonging to the king's palace; but *magnum consilium regni;* for that, in those times, it belonged only to them to consult with the king in state matters, and matters of the kingdom; inasmuch as no others in the kingdom possessed any thing but under him." Spelman's English Works.

§ 34. In conformity to these principles we find that, during the reign of William I. and that of his sons, and even down to the time of king Henry III., the *magnum consilium*, or How first composed.

parliament, was composed, not only of the great ecclesiastics, and the principal temporal nobility who were possessed of earldoms and baronies, but also of all those who held their lands immediately of the crown *in capite* by knight service.*

Id. Part ii. c. 5. § 20.

§ 35. Mr. Selden has produced such proofs of this fact during the reigns of William Rufus and Henry I., as might be expected, from the paucity of materials relating to that period. As to the reign of king Henry II., he says, "To the parliament of Northampton, also, or the *magnum consilium*, as Roger of Hoveden and others call it, held in October, the eleventh year of Henry II., or 1165, all that were tenants in chief were summoned. *Castro Northamptoniæ*, (saith an ancient writer of the life of Thomas Becket, archbishop of Canterbury, speaking of the king,) *Solenne statuens celebrare consilium, omnes qui de rege tenebant in capite mandari fecit.*

§ 36. In the reign of king John, we have the unanswerable evidence of *Magna Charta* to this fact. For in that statute is the following enumeration of the persons who then composed the great council of the nation: — *Et ad habendum commune consilium regni de auxilio assidendo, aliter quam in tribus casibus prædictis, vel de scutagio assidendo, summoneri faciemus archiepiscopos, episcopos, abbates, comites, et majores barones, sigillatim per litteras nostras, et preterea faciemus summoneri in generali per vicecomites et ballivos nostros omnes illos qui de nobis tenent in capite.*

§ 37. The persons who held their lands immediately of the conqueror are all enumerated in Domesday, and in the Appendix to Doctor Brady's Introduction to the History of England. They do not exceed seven hundred, of whom several held in socage, or by petit serjeanty. These possessed all the lands in the kingdom, except what belonged to the church, and that part reserved for the maintenance of the king and his family, which in Domesday is called *terra regis.*

1 Inst. 108.

* It has been shewn that the general assembly of the Lombards was composed in this manner—*Ante*, § 25. *note.*

§ 38. We find in Tacitus that the German nations settled all matters of importance in general assemblies. *De minoribus rebus principes consultant, de majoribus omnes. Ita tamen ut ea quoque quorum penes plebem arbitrium est, apud principes pertractentur.* This practice was universally followed by their descendants, when they established themselves in the south of Europe; and among others by the Saxons who settled in England, where general assemblies were well known prior to the arrival of the Normans, by the name of wittenagemotes, or meetings of wise men. De Mor. Germ. c. 11.

§ 39. As these assemblies existed long before feuds became general, which was not till about the tenth century, they could not possibly be derived from feudal principles. Upon the continent the feudal law was introduced by slow degrees; and though its establishment may have produced some alteration in the constitution of the general assemblies there, still they did not owe their origin to that singular polity. In England the feudal system was established in the course of the twenty years that elapsed immediately after the conquest, and the Saxon laws were almost entirely abolished. So that the idea of our general councils or parliaments was entirely deduced from the feudal law, that is, from the *curia regis*, and not from the wittenagemote of the Saxons, or the general assemblies of the continent, which were founded on more enlarged principles, and did not consist of the king's immediate tenants only, but included all the principal freemen of the nation. These assemblies ceased with the Anglo-Saxon dynasty, and were succeeded by a feudal parliament.

§ 40. In a tract entitled, "An Enquiry into the Manner of creating Peers," published in the year 1719, and supposed to have been written by Richard West, Esq., Lord Chancellor of Ireland, is the following passage: — "And although it is very true, that there were great or common councils, both in England and Scotland before so much of the institution of tenures of land by knight service, &c., or of manors, in this kingdom; and that, therefore, the feudal law cannot be considered as the first original or foundation of parliaments Page 10.

(as has been by some imagined); yet if we consider the English government only as it has been since the Norman conquest, it will be found natural to look upon our Anglo-Norman monarchy to be in great, what every manor is in miniature; and that therefore our parliaments do in a great measure resemble, and may not improperly be styled, the court baron of the kingdom; and I cannot but think this to have been the notion of antiquity: for, in the great case between the two kings of Navarre and Castille, which was referred to the judgment of our Henry I. and his barons, the judgment is entered, if I may use that expression in this manner, *Comites et barones regalis curiæ Angliæ adjudicaverunt.*"

Robertson's Hist. of Scotland v. i. 79.

Barones majores et minores.

§ 41. In the reign of king John, an alteration of great importance took place in the rights of the barons and tenants *in capite*; for only the principal barons, or *barones majores*, were summoned to attend parliament, by particular writs from the king; and the rest, who acquired the name of *barones minores*, were called by one general summons from the sheriffs of their respective counties. This practice was recognized and legally established by the *Magna Charta* of king John, as appears from the passage already transcribed.

Ante, § 36.

Id. c. 5. § 21.

§ 42. Mr. Selden supposes, that in consequence of the quarrels between king John and his barons, several baronies had escheated to the crown, either by attainder, or otherwise, which were partly granted to others, and partly retained as rewards for those who should come over to the king. That several barons were also so decayed in their estates as not to be able to support their rank; and the ancient barons, or *barones majores*, who retained their possessions, foreseeing that their dignity might be diminished if the new tenants in chief, or grantees of the escheated baronies, and the decayed barons, should remain equal to them, procured a law in some of the parliaments preceding the Great Charter, by which they only in future should be stiled barons, and the rest tenants in chief, only, or knights. And because their ancient name could not be wholly taken from them, therefore the addition of *majores* was given to the ancient

and more powerful barons, and that of *minores* to the others.

Necessity of a writ of summons.

§ 43. From this period, the right of sitting in Parliament appears to have been confined to those persons who were possessed of entire baronies. But in the reign of king Henry III. a still greater alteration took place in the rights of the barons; for whereas, every tenant *in capite* was, before that period, *ipso facto*, a parliamentary baron, and entitled to be summoned, either by the king's writ, or by the sheriff of the county, to every parliament that was called: yet, about that time, some new law is said to have been made, by which it was established that no person, though possessed of a barony, should come to parliament without being expressly and particularly summoned by the king's writ.

§ 44. This fact is first mentioned by Camden in the Preface to his *Britannia*, who cites an ancient author, without naming him as his authority. — *Ad summum honorem pertinet ex quo rex Henricus III. ex tanta multitudine quæ seditiosa et turbulenta fuit, optimos quosque rescripto ad comitia parliamentaria evocaverit. Ille enim (ex satis antiquo scriptore loquor) post magnas perturbationes et enormes vexationes inter ipsum regem, Simonem de Monteforti, et alios barones, motas et susceptas, statuit et ordinavit quod omnes illi comites et barones Angliæ quibus ipse rex dignatus est brevia summonitionis dirigere, venirent ad parliamentum suum, et non alii, nisi forte dominus rex alia vel similia brevia eis dirigere voluisset.*

§ 45. Mr. Selden appears to have given but little credit to this narrative; and says, he never could discover who this ancient writer, cited by Camden, was; but thought that, not long after the Great Charter of king John, some law was made that induced the utter exclusion of all tenants in chief from parliament, beside the ancient and greater barons, and such others as the king should in like manner summons.

§ 46. In consequence of this law, the practice of summoning the *barones minores*, by the sheriff, ceased, as appears from the *Magna Charta* of 9 Henry III. in which the chapter

respecting the summoning of the barons and tenants *in capite*, in the charter of king John, is entirely omitted.

§ 47. From this period, the dignity of a parliamentary baron was confined to those who were summoned by the crown; this appears from the words of the writ, by which the king certifies a person to be a peer, as stated in the *Registrum Brevium*, a book as ancient as the Statute of Westminster, 2. 13 Edward I. which are, *Quia prædictum, G. unum baronum regni nostri, ad parliamenta nostra de summonitione regia venientium, recordamur.*

P. 287. Ed. 1687.

§ 48. It cannot, however, be supposed, that the crown ever possessed the prerogative of omitting to summon the principal nobles to every parliament, pursuant to the provisions of the *Magna Charta* of king John; for there is one instance recorded in our history of an omission of this kind, which was immediately noticed in such a manner as to prevent its recurrence.

Mat. Paris.

§ 49. In the year 1225 king Henry III. called a parliament at Westminster, and several of the peers being absent for want of writs of summons, the barons who attended refused to answer the king's proposals, for this reason, *Quod omnes tunc temporis non fuerunt, juxta tenorem Magnæ Chartæ vocati; et ideo sine paribus suis tunc absentibus, nullum voluerunt tunc responsum dare, vel auxilium concedere vel prestare.*

Title of Baron.

§ 50. With respect to the different orders, and names or titles of nobility and dignity in England, the most ancient are those of baron and earl.—It has been stated that the word *baro* was originally synonymous with *homo;* and a very learned French antiquary was of opinion, that all those persons to whom feuds were granted by kings and sovereign princes, were called *barones et homines regis, sive qui hominium regi debent.*

Balusii Capitularia, v. ii. 692.

Gloss. voce Baro.

§ 51. Sir Henry Spelman says, the word baron was introduced into England by the Normans: *Ad Anglos autem pervenisse videtur vocabulum baro, vel cum ipsis Normannis, vel cum Edwardus Confessor aures moresque imbibisset Normannicos.* The first mention of the word which I have met with, is in Domesday, Vol. ii. 367. where it is said, *Hanc terram invadiavit abbas et barones regis.* And *Eadmerus*, who lived

in the time of king Henry I. speaking of William the Conqueror, says; *Nulli episcoporum permittebat ut aliquem de baronibus suis, seu ministris, publicè excommunicaret.*

§ 52. Mr. Selden observes that in the extracts from the Inquisitions, taken in the time of king John, the phrases of *tenentes per baroniam et servitia militaria;* and *milites et barones tenentes in capite de rege*, are used for the same persons. In another place he says, *Tenere de rege in capite, habere possessiones sicut baroniam*, and to be a baron, with a right to sit with the rest of the barons in councils or courts of judgment, according to the laws of that time, were synonymous; and Spelman says, *Ævo Henrici Secundi quævis tenura in capite habebatur pro tenura per baroniam.* Id. s. 17. Id. s. 20.

§ 53. Lord Coke has observed that in antient records the barons included the whole nobility of England, because regularly all noblemen were barons, though they had a higher dignity; and the great council of the nobility were all comprehended under the name of the Council *De Baronage.* This is confirmed by Mat. Paris, in whose history we find the word *baronagium* used as comprehending all the nobility.—*Dominus rex de consilio totius baronagii sui;* and Dugdale has transcribed the following writ of king Henry III. to the sheriff of Herefordshire.—*Rex Vicecomiti Heref'.—Precipimus tibi quod si aliqua gens armata per ballivam tuam, contra provisionem nuper factam apud Gloucestriam, de communi concilio baronagii nostri.* 2 Inst. 6. Fol. 581. Orig. Jur. 17. Rot. Parl. vol. i. p. 282.

§ 54. In consequence of the practice of subinfeudation, the great lords, particularly those who were earls palatine, called their immediate tenants or vassals, barons. Thus the earls of Chester and the bishops of Durham had their barons. The city of London and the Cinque Ports had also their barons. In like manner the parliamentary barons were called *barones regis*, or *barons regni*, in order to distinguish them from those inferior barons.

§ 55. The next name or title of dignity is that of *comes*, Earl; which was also introduced into England by the Normans, at the Conquest. From that period to the end of the reign of king Henry III. baron and earl were the only names of dig- Title of earl.

nity, or titles known in England; for in the second chapter of the Magna Charta of king Henry III., that prince says, *Si aliquis comitum vel baronum nostrorum, sive aliorum de nobis tenentium in capite;* from which Lord Coke concludes, that if any other name of dignity had been known at that time, it would have been mentioned.

2 Inst. 5.

Gloss. voce Comes.

§ 56. Spelman was of opinion that the title of Earl was derived from the Germans, and having been adopted from them by the French, was rendered feudal and hereditary by Hugh Capet; after whose example the Conqueror introduced it into England. — *Quo edoctus exemplo, Gulielmus, novi utique apud Anglos regni fundamenta ponens, commilitones suos feodalibus exornavit dignitatibus: fortè etiam auxioribus ævo Saxonum; nam cessisse jam videtur munus heretochii comitatus, in munus ipsius comitis.*

Seld. Id. § 7.

§ 57. An opinion formerly prevailed that the appellation of *comes* arose from the circumstance of the earl's being *comes et socius fisco in percipiendis.* Because generally the earl had the third part of the profits arising from the pleas of the county.

Thus in the dialogue respecting the exchequer, attributed to Gervase de Tilbury, who lived in the reign of king Henry II., it is said, — *Comes est qui tertiam partem et portionem eorum qui de placitis proveniunt in comitatu quolibet, percepit. Summa namque illa quæ nomine firmæ requiritur a vicecomite, tota non exurgit in feodorum redditibus, sed ex magna parte de placitis provenit et horum tertiam partem comes percepit. Qui ideo sic dicitur, quia fisco socius est et comes in percipiendis.*

Lib. c. i. 17. Madox, Exch.

Id. § 7.

§ 58. Mr. Selden dissents from this opinion, and observes that Bracton, who lived about the end of the reign of king Henry III., does not derive the word *comes* from *comitatus;* his words are,—*Comites quia a comitatu sive societate nomen sumpserunt; qui etiam dici possunt consules, a consulendo; reges enim tales sibi associant ad consulendum, et regendum populum Dei; ordinantes eos in magno honore et potestate et nomine, quando accingunt eos gladiis, &c.* And that several earls had not the third penny, for that an ancient author, cited by Camden, says; — *Non omnes comites ita percipiunt, sed hi*

Lib. i. c. 8. § 2.

quibus rex hereditario personaliter concessit. It will be shewn in the next chapter that there were formerly three kinds of earls, of which only one had the third penny.

§ 59. The next name or title of dignity, in point of antiquity, and the first in point of rank, is that of *dux*, Duke; which originally signified the commander of an army, not only among the Romans, but also during the middle ages. Title of duke.

§ 60. The first creation of this title in England, as distinguished from that of earl; (for in elder times, Selden says, they were synonymous,) was in the eleventh year of king Edw. III. when that monarch created his eldest son, the Black Prince, being then earl of Chester, duke of Cornwall.

§ 61. As the term *dux* or duke was used in the description of earls, many ages before it became a distinct dignity; so also was that of *marchio*, or marquis; sometimes both for earls and barons; but especially for those who were lords marchers, or governors of the frontier provinces, whence the word originated. Title of marquis. Seld. id. § 30.

§ 62. At the coronation of queen Eleanor, wife of king Henry III., John Fitzallan, Ralph Mortimer, John of Monmouth, and Walter Clifford, as *marchiones de marchia Walliæ*, being lords marchers of Wales, claimed as *jus marchiæ*, to carry the canopy which belonged to the barons of the Cinque Ports. Id.

§ 63. The title of marquis, as distinguished from other titles of honour, was unknown in England until the beginning of the reign of king Richard II., when Robert De Vere, then earl of Oxford, was created marquis of Dublin, for life, by a charter, which is entered among the rolls of parliament, of which the operative words are, — *De assensu prelatorum ducum et aliorum procerum, ac communitatis regni Angliæ, in instanti parliamento nostro apud Westmonasterium convocato existentium; prefato Roberto (De Vere), nomen Marchionis Dublin imponimus, et ipsum in nomine marchionis dicti loci presentialiter investimus, &c. Habendum et tenendum de nobis et heredibus nostris quoad vixerit.* Id. Vol. iii. 209.

§ 64. Mr. Selden observes that the above charter created

an English dignity, and that by reason of it Robert De Vere was placed between the dukes and earls in parliament.

Vol.iii.209. This appears from the following entry, in the rolls of parliament: — *Et capto immediatè ejus homagio, pro statu terra et dominio prædictis, cum vultu hilari inter pares parliamenti in gradû celsiori, videlicet, inter duces et comites, sedere mandavit. Quod idem marchio gratantius incontinenti fecit.*

Rot. Parl. vol.iii.488. § 65. John de Beaufort, earl of Somerset, was created marquis of Dorset, by king Richard II.; but was deprived of that title by king Henry IV. The commons petitioned that prince to restore to him the title of marquis, which he himself opposed; and humbly prayed the king, *Que come le nom de marquis furt estrange nom en cest royaulme qu'il ne lui vorroit auscunement donner cil nome de marquis; car jamais par congé du roi il ne vorroit porter, ne accepter sur luy nul tiel nom en auscune maniere.*

Title of viscount. § 66. The most modern title of dignity is that of viscount, which, in point of rank, is between that of earl and baron; and is the same word which denotes the sheriff of a county.

Seld. Id. 8. § 31. § 67. This title was first introduced into England by king Henry VI., who created John lord Beaumont viscount Beaumont, by letters patent.

The words of creation are — *Nomen vicecomitis de Beaumont imponimus, ac ipsum insigniis vicecomitis de Beaumont realiter investimus, locumque in parliamentis consiliis et aliis congregationibus nostris, super omnes barones regni nostri assignavimus eidem.*

§ 68. The dignity of viscount was at that time well known in France, and, like all dignities in that country, was of a feudal nature, and annexed to lands. And it is observable, that when king Henry VI. created lord Beaumont an English viscount, he also granted to him the viscounty of Beaumont, in France, which had been forfeited to the crown by the rebellion of the duke of Alençon, and granted by king Henry V. to his brother, the duke of Bedford, but by his death had reverted to the Crown.

§ 70. By the constitution of every feudal kingdom in Europe, all dignities were derived from the sovereign. And Lord Coke says that, by the law of England, all the degrees of nobility are derived from the king, as the fountain of honour. Sir W. Blackstone has laid down the same doctrine. And although dignities have been frequently granted in parliament, yet it does not appear that the assent of the peers was ever deemed necessary to the creation of dignities, as will be shewn in a subsequent chapter.

Derived from the crown.

4 Inst. 363.

Ch. 3.

CHAPTER II.

DIGNITIES BY TENURE.

§ 1. *Dignities originally annexed to Lands.*
5. *Origin and Nature of Manors.*
10. *Superior and Inferior Manors.*
14. *The Superior Manors became Baronies.*
18. *Had a Civil and Criminal Jurisdiction.*
22. *And a capital Mansion or Castle.*
27. *Were holden of the Crown.*
29. *By the Tenure of Grand Serjeanty.*
40. *Relief of a Baron.*
46. *Fees on doing Homage.*
48. *Extent of a Barony.*
54. *Divisible among Coheirs.*
58. *Number of Baronies.*
61. *Honours.*
69. *All Tenants per Baroniam were not Peers.*
75. *But the Dignity of a Baron was annexed to some Estates.*
83. *Ecclesiastical Baronies.*
93. *Earldoms by Tenure.*
108. *Were great Manors.*
117. *The Dignity of Earl annexed to some Estates.*
125. *Dukedoms by Tenure.*
130. *Dignities by Tenure saved in the Stat.* 12 *Cha.* 2.

SECTION I.

Dignities originally annexed to lands.

WITH respect to the various modes by which dignities may be created, it has been shewn that our dignities were originally feudal, and introduced into England, together with the rest of that system, by the Normans. That they were annexed to the possession of certain estates in land, and must have been created by a grant of those estates.

Ch. i. § 14.

§ 2. We have seen that dignities were created in this manner in France and in Normandy. In Scotland the same practice prevailed. Thus, in the printed case of the earldom of Sutherland, it is said, that the most ancient mode of conferring honours in Scotland was by erecting certain estates into an earldom, &c. and investing the grantee with those estates, of which several instances are given. And in the return made by the lords of sessions of Scotland in 1739 to the house of lords, respecting the state of the Scotch peerage, it is said, that before the reign of king James VI. titles of honour and dignity were created by erecting lands into earldoms and lordships.

§ 3. As all the ancient grants of lands made by the conqueror and his sons to their followers, are now lost, there exists no instance of the crown's erecting an estate into a barony or earldom; it is, however, admitted that such was the ancient practice. For lord Coke says, "but now the ancient manner of creation is altered; for now, when the king creates a duke, a marquis, an earl, a viscount, or a baron, he seldom creates a dukedom, marquesdome, earldome, &c. *ad sustinendum nomen et onus*, viz. to grant him manours, lands, tenements, &c. to hold of him in chiefe; for commonly upon creations the king grants to them created an annuity." And in lord Gerard's case, Wright, serjeant, says:—"The legal constitution of a barony is, when the king creates certain lands to be a barony." 2 Inst. 9. Rep. Temp. Holt, 261.

§ 4. It also appears from our ancient records, that the dignities of baron and earl, with a right of sitting in parliament, continued to be annexed to the possession of some feudal seigneuries or lordships for a long time after the Conquest, a fact which is fully admitted by all our eminent antiquaries; by Camden, Spelman, Dugdale, and Selden. It will therefore be necessary to enquire into the nature of those manors, seigneuries or lordships, and to state the cases in which dignities have been held to be annexed to the possession of them.

§ 5. It has been shewn in the preceding chapter that upon the establishment of the Normans in England, the conqueror conferred the estates of the Saxon thanes upon his principal followers, as strict feuds, to be held immediately of himself, by homage fealty, and military or other honorable services. The usual services reserved on these grants were the services of a certain number of knights; and the persons who received them, in order to be able to perform their services, gave out by subinfeudation, portions of the lands to their followers, to be held of themselves by knight service; reserving a tract of land round their castle, or mansion-house, for the maintenance of their own family; by which means their estates became feudal seigneuries, consisting of demesnes and services, and were called manors. Origin and nature of manors. Perk. § 670. Co. Cop. § 31.

§ 6. It has been shewn that to every grant of a *feudum*

nobile, or *feudum dignitatis*, a jurisdiction was always annexed. In conformity to this practice, it may be presumed that in all the grants of lands made by the Conqueror and his sons, to be holden of the crown *in capite*, a civil and criminal jurisdiction was given. For it appears from Dugdale's Monasticon, that in almost all the charters of lands granted by the crown to abbies, a civil and criminal jurisdiction was expressly given. And we know that from time immemorial every lord of a manor has exercised a jurisdiction over his tenants; a franchise which must have been originally derived from the crown.

§ 7. The court in which the lord of a manor exercised his jurisdiction was called *curia baronis*, the court baron. And
Cop. § 31. lord Coke says:—"If we labour to search out the antiquity of these courts baron, we shall find them as ancient as manors themselves. For when the ancient kings of this realm, who had all the lands of England in demesne, did confer great quantities of land upon some great personages, with liberty to parcel the lands out to other inferior tenants, reserving such duties and services as they thought convenient; and to keep courts where they might redress misdemeanors, within their precincts, punish offences committed by their tenants, and decide and debate controversies arising within their jurisdiction, these courts were termed courts baron."

§ 8. Every estate of this kind had a capital mansion on it, as of which the lands granted out to the tenants were held. And being the residence of the lord, it was called in old French *manoir*, à manendo, from which the whole acquired the name of manor. It is also called, and with more propriety, a lordship, being in fact a feudal seignory or *dominium*, annexed to the possession of the demesnes, over the tenants holding lands by a subinfeudation from the ancient proprietors of such demesnes, by certain services, with a jurisdiction over
Cop. § 31. those persons. And lord Coke says, "A manor in these days signifieth the jurisdiction and royalty incorporate, rather than the land or scite."

Gloss. voce Manerium. § 9. *Manerium* (says Spelman) *est feudum nobile, partim vassallis, quos tenentes vocamus, ob certa servitia concessum; partim domino in usum familiæ suæ, cum jurisdictione in*

vassallos, ob concessa prædia reservatum. Quæ vassallis conceduntur, terras dicimus tenementales, quæ domino reservantur dominicales. Totum vero feudum dominium appellatur, olim baronia. Unde curia quæ huic præest jurisdictioni, hodie curia baronis nomen retinet. Cowell's Inst. Lib. ii. Tit. 2. § 8.

§ 10. The persons to whom the great lords granted lands, to hold of them by knight service, were called *valvasores*, of whom Spelman gives the following account:—*Sunt ergo valvasores majores, qui non a rege immediatè sed secunda vice feuda acceperunt, scil. a ducibus, marchionibus, vel comitibus; hoc est a regni vel regis capitaneis.* And Bracton says an estate thus held was called *vavasoria.* Superior and inferior manors. Gloss. voce Valvasor. Seld. Id. § 14. Bract. 93. b.

§ 11. These *valvasores majores* again granted out portions of their lands to free persons, to be held of themselves in socage, who were called *valvasores minores*, by which means the *valvasores majores* created manors of an inferior kind, whereof they were the immediate lords; and the baron or king's tenant *in capite* was the lord paramount.

§ 12. In consequence of this practice, manors became divided into two sorts, which Bracton calls *maneria capitalia et non capitalia. Et sciendum est quod manerium poterit esse per se ex pluribus ædificiis coadjuvatum, sive villis vel hamlettis adjacentibus. Poterit enim esse manerium et per se, et cum pluribus villis, et cum pluribus hamlettis adjacentibus quorum nullum dici potest manerium per se, sed villæ sive hamlettæ. Poterit enim esse per se manerium capitale, et plura continere sub se maneria non capitalia, et plures villas et plures hamlettos, quasi sub uno capite, et dominio uno.*

§ 13. The practice of creating inferior manors was effectually prevented in the reign of king Edward I. by the statute *Quia Emptores Terrarum*, which reciting the inconveniences arising from subinfeudations, that is, from feoffments of lands, to be held of the feoffors, enacted, that upon every future conveyance of lands, the grantee should hold of the chief lord, and not of the grantor. But these provisions not extending to the king's own tenants *in capite*, the like law concerning them was declared by the statutes *Prerogativa Regis*, 17 Edw. II. c. 6. and 4 Edw. III. c. 15., by which last all subinfeudations 18 Edw. 1. c. 1. 1 Inst. 98. b. 2—500.

previous to the reign of king Edward I. were confirmed. But all subsequent to that period were left open to the king's prerogative.

The superior manors became baronies.

§ 14. Every lord of a manor held immediately of the crown, was during the first century after the Conquest, deemed a baron, and his manor a barony. Thus Spelman says:—

Gloss.voce Manor.

Manerierum dominos, etiam minores inter barones censeri manifestum est, cui fidem facit quod ipsæ hæ curiæ usque hodie curiæ baronum nuncupantur. Ævo præterea Henrici Primi procerum appellatione computari videntur omnes manerierum domini. Nam quos in epigraphe 25. *legum suarum proceres vocat, eosdem mox in capite, barones sochnam suam habentes, exponit.*

§ 15. But although every manor held immediately of the crown, was originally a barony, and the lord thereof a member of the *curia regis*, and the *magnum consilium*, yet when the barons where divided into *majores* and *minores*, it is probable that those only who possessed *maneria capitalia*, of which inferior manors were held, were considered as *barones majores*, and retained the dignity of barons; while those who had but a *manerium non capitale*, were called *barones minores*; and the crown having ceased to summon them by particular writs to parliament, in the reign of king John, or that of king Henry III., they lost the dignity and appellation of baron, and became mere lords of manors.

§ 16. In course of time the manor or seignory to which the dignity of a baron was annexed, acquired the name of *baronia*; and it appears from all our ancient writers, that such estates were extremely common, for some centuries after the Conquest.

Lib.ix.c.6. Thus we read in Glanville:—*Mortuo enim aliquo capitali barone, statim baroniam in manu suo retinet rex, donec hæres grantum suum fecerit de relevio.*

§ 17. It is thus enacted by king John's *Magna Charta*, c. 42, —*Si aliquis tenuerit de aliqua escaeta, sicut de honore de Wallingford, Nottingham Bolon, et de aliis escaetis quæ sunt in manu nostra, et sint baroniæ; et obierit, hæres ejus non det alium relevium, nec faciet nobis aliud servitium quam faceret baroni,*

87. b. *si baronia esset in manu baronis.* Bracton also says:—*Item si dominus rex tenuerit aliquam baroniam, vel terram.* And in

another place:—*Ut si fuerit contentio inter partes, in qua baronia, vel in cujus feodo, tenementum fuerit.*

§ 18. It has been stated that to every manor was annexed a jurisdiction, and a court, called the court baron, for the exercise of it. The civil jurisdiction was called *soca et sacha;* the criminal *infangthefe* and *outfangthefe.* These latter words are thus explained by Spelman:—*Significant latronem infra captum, hoc est infra manerium vel jurisdictionem alicujus, jus habentis de eodem cognoscendi. Regale quidem privilegium, et in antiquis diplomatibus, majoribus regni frequenter concessum. Qui ipso hoc verbo talem assecuti sunt potestatem.*

Had a civil and criminal jurisdiction.

Glanv. lib. viii. c. 10.

Barrington on Stat. 1 Hen. 4.

§ 19. By the *Magna Charta* of 9 Hen. III. c. 17. sheriffs of counties, constables of castles, escheators and coroners were prohibited from holding pleas of the crown. And lord Coke says:—"Albeit the franchises of infangthiefe and outfangthiefe, to be heard and determined within courts-baron belonging to manors, were within the said mischief, yet we find, but not without great inconvenience, that the same had some continuance after this act. But either by this act, or *per desuetudinem*, for inconvenience, these franchises within manors are antiquated and gone."

§ 20. It appears, however, from the *Placita de Quo Warranto* lately published by government, that in the reigns of the three first Edwards, a great number of lords of manors claimed and established a right to exercise a criminal jurisdiction in their courts baron.

§ 21. Spelman was of opinion that the criminal jurisdiction constituted the difference between the *barones majores* and *minores.—Barones autem antiqui estimati sunt, qui in suis dominiis de litibus cognoscebant, et latrociniis. Consuetudines habentes quos soc, sac, toll, team, ing fangthefe et outfangthefe appellant. Barones minores simpliciter sunt simplices villarum maneriorumque domini, de quocunque tenentes, qui socham et sacham habent, id est, curiam et jurisdictionem super vassallis suis. Non autem summam justitiam, qua de vita vel membris decernant, sed humilem illam, ad prædia pertinentem, ex qua curiæ suæ,* base courts, i. e. *infimæ nuncupantur. Uti etiam Valerius Publicola secures a fascibus sejunxit. Ita antiquitas*

Gloss. voce Baro.

barones majores a minoribus distrinxit; istis tribuens justitiam infimam, illis vero summam atque regiam.

And a capital mansion or castle. 1 Inst. 5. a. Plac. de quo Warranto, p. 75. 2 Inst. 16.

§ 22. Every barony had a capital mansion upon it for the residence of the lord. It was frequently a castle, or embattled house, which no subject could erect without the king's licence. This was called *caput baroniæ*, and was so appropriated to the person entitled to the barony, that it could not be assigned to a widow for her dower.

Idem. 31. 4 Rep. 88. b.

§ 23. Lord Coke says, — "Regularly every castle contains a manor," and where the *caput baroniæ* was a castle, the entire manor was called *caput baroniæ;* which is confirmed by the following passage in Bracton: —

Bract. 93. a.

In electione viri erit de cujus feodo velit uxorem suam nominatim dotari. Dum tamen manerium illud non sit caput baroniæ; si plura alia habuerit maneria, quæ non sint capita baroniæ. Quia manerium quod est caput baroniæ integre remanebit hæredi.

1 Inst. 31. b. note.

§ 34. In lord Hale's notes to the first Institute, published by Mr. Hargrave, he refers to the Close Roll, 20 Hen. III. m. 3., *pro uxore Roberti Fitzwalter;* where a whole manor was reseised, because it was *caput baroniæ;* though assigned in dower by the husband.

Pa. 17.

§ 25. Madox, in his *Baronia Anglica*, cites a record in 2 John, from which it appears, that, a doubt having arisen concerning a knight's fee in Eaton, Elias Croc prayed, that he might have the judgement of the king's court, whether his father could alien that fee to his younger brother, in regard that it was a barony, and the *caput honoris.* Not, says Madox, that it was an entire barony, for one knight's fee could not amount to a barony, but that it was a baronial fee, not barely a knight's fee. As if he had said, inasmuch as the said fee is baronial, and not only so, but even the capital seat of the manor or barony.

Idem.

§ 26. Madox also observes, that a city or town could not be the head of a barony. When a town was part of a barony, it was considered as part of the demesnes. But if there was a castle there, it was usually the head of the

barony. The castle belonging to the barony was an honorary part of it; the town a plebeian, or inferior part.

§ 27. Every barony was held *in capite*, of the crown. Thus, in 24 Edw. III., Year Book, 66., one of the judges says, — *A cela diomus nous que la baronnie de M. fuit tenu de nostre seigneur le roi, en chief, sans mesne, come toutes les baronnies sont.* And the second chapter of Magna Charta begins thus: "*Si quis comitum vel baronum nostrorum, sive aliorum tenentium de nobis in capite.*" Upon which lord Coke observes, — "It is to be understood that of ancient times, as it evidently appeareth by this chapter, and by our books, every earldom and barony were holden of the king *in capite;* which proveth that both the dignities of the earl and baron, and the earldom and barony, were derived from the crown.

Was held of the crown.

2 Inst. 7. 1 Inst. 83. b. 4 Inst. 363

§ 28. Every barony in England (says Madox) was at one time or other created by the king. Originally, or in its first creation, it moved from the king himself, the chief lord of the whole realm; and could be holden immediately of no other lord.

Baronia Angl. 2.

§ 29. It is somewhat singular that neither Dugdale nor Selden has endeavoured to explain the nature of the tenure by which baronies were held; although the words *tenere per baronium*, or, *per servitium unius baroniæ*, perpetually occur in our ancient writers and records. And that Madox, who has expressly treated of land baronies, is equally silent on this head.

By the tenure of grand serjeanty.

§ 30. There can be no doubt but that most of the ancient baronies were charged with the service of a certain number of knights; this circumstance alone does not however distinguish them from other manors holden by knight service *in capite;* of which there were many that were not baronies. And therefore something more than the service of a certain number of knights must have been necessary to constitute a barony.

§ 31. In Mr. West's Enquiry into the Manner of creating Peers, is the following passage:—"I think it clear that every barony was a tenure *in capite*, but then it is as clear that every tenure *in capite* was not *vice versâ* a barony; and since the term *tenant* is, or at least was, equally applicable to

Pa. 18.

all services; what distinguishes a baron from all other tenants *in capite* cannot be want of mesnalty between himself and the crown; but must be the reservation of some particular services, of a superior nature, which are implied in the phrase *tenere per baroniam.*

6 Coke's Rep. 73.

§ 32. In the case of Sir Drew Drury, in the court of wards, 5 Ja. I., as reported by lord Coke, the two chief justices, and the chief baron, in the presence of the earl of Salisbury, after conference among themselves, declared, that "In ancient time every baron, &c. held his barony, &c. by grand serjeanty, as appeared 18 Ass. Pl. ult. in Clifford's case, and the lord Cromwell's case, 2 Rep. 80. a., which service, as Littleton says, is called grand serjeanty, or *magna serjentia*, because it is a greater or more worthy service than knight service." And in lord Coke's comment on Littleton, it is said — "The lord Clifford did hold his barony, and the sheriffwick of Westmoreland, by grand serjeanty *in capite*. And in lord Cromwell's case it is laid down, that every barony in ancient time was held by grand serjeanty.

1 Inst. 222. a.

2 Coke's Rep. 81. a.

§ 33. In the case of the county palatine of Wexford, as reported by Sir John Davies, earls palatine are said to have royal services, having power to create tenures *in capite*, and also tenures by grand serjeanty; for they had power to create barons.

Collins, 184. W. Jones, 114.

§ 34. In lord chief justice Crew's argument respecting the office of great chamberlain of England, is the following passage: — "The earl of Arundel being seised in fee of the castle and manor of Arundel, being held by grand serjeanty, as all the ancient earldoms and baronies were." And in Mr. Justice Doddridge's argument respecting the barony of Abergavenny, he says — "Barons by tenure are those which do any honor, &c. as head of their barony, *per baroniam*, which is called grand serjeanty. It is also stated in this last case, that the castle and honor of Abergavenny was originally granted to be holden *per baroniam, sive* grand serjeanty.

Collins, 109.

Id. 132.

§ 35. These passages have not been noticed by any modern writer; they appear, however, to carry considerable weight with

them, and are confirmed by Spelman, a great authority, in whose Glossary, after explaining the words *magna serjeantia*, comes the following passage: — *Quin et procerum omnes dignitates, scil. ducum, marchionum, comitum, vicecomitum, baronum, hoc tenentur servitio.*

§ 36. If we suppose that, upon the creation of a barony, the service of attending the king in his court, on the three great festivals, and at other times, when summoned, was specially reserved, the tenure would be grand serjeanty. For this might be considered as a special honorary service to the king. Now it appears from a passage in the Constitutions of Clarendon, which were made in 10 Henry II., that such was the service due by every person holding *per baroniam*. For it is there declared that the bishops and great abbots should thenceforth hold their possessions of the king, *sicut baroniam, et sicut cæteri barones debent interesse judiciis curiæ regis cum baronibus*. And it will be shewn hereafter that those abbots who were not comprehended within this law, and did not hold *per baroniam* *, were not obliged to attend parliament, though summoned by the king's writ.

Preface to summons.

§ 37. It is mentioned by Dugdale, that while baronies were by tenure, the husbands of women seised of such baronies, were entitled to writs of summons for, and liable to, perform the services annexed to such baronies, and consequently must have been bound to attend parliament when summoned.

§ 38. As none of the ancient charters by which baronies were created are extant, it is impossible to say in what manner, and by what words, the service of attending the king's courts, which constituted the difference between a grant of a barony, and that of a manor, to be held by the service of one or more knights, was reserved. But after the nature of a barony, and the services due for it, were fully known and settled, the words *tenendum per baroniam*, or *per servitium unius baroniæ*, were generally used to denote that species of tenure.

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* *Vide infra*, the cases of the Abbot of St. James, near Northampton, and of the Abbot of Leicester.

1 Inst. 97. a.

§ 39. Thus lord Coke has cited a charter of king Stephen, by which he granted certain lands to the abbey of Feversham, in Kent, *tenendum per baroniam.* In another place he says —"If the king give land to one and his heirs, *tenendum per servitium unius baroniæ.*" And in a modern case, lord chief justice Holt has said, "A barony is where the king gives lands or rents to the person he designs to make a baron, and these he is to hold *per baroniam.*"

2 Inst. 5.

5 Mod. 65. 12 Id. 84 Salk. 253.

Relief of a baron.

§ 40. By the feudal law, the lord, upon the death of his tenant, became entitled to a sum of money from the heir, as a fine or composition for the renewal of the investiture, which was called a relief. In Glanville's time the relief of a knight's fee was fixed at 100 shillings, but that of a barony was uncertain. *De baroniis vero nihil certum statuendum est, quia juxta voluntatem et misericordiam domini regis solent baronie capitales de releviis suis domino regi satisfacere.*

§ 41. The reliefs of earls and barons were, however, reduced to a certainty before the *Magna Charta* of king John, in which is the following clause:—*Si quis comitum vel baronum nostrorum, sive aliorum tenentium de nobis in capite, per servitium militare, mortuus fuerit, et cum decesserit heres suus plenæ etatis fuerit, et relevium debeat, habeat hereditatem suam per antiquum relevium. Scilicet heres heredis comitis, de baronia comitis integra, per centum libras. Heres vel heredes baronis de baronia integra, per centum marcas.*

§ 42. In some ancient copies of the *Magna Charta* of king Henry III., referred to in the folio edition of the Statutes, published by government, the relief of a barony is stated to be *centum libras.* But this reading appears erroneous, and *marcas* to be the true one. For, 1st, An earldom was alway considered, not only on the continent, but also in England, as superior to, and of greater annual value than a barony; therefore the relief ought to be greater. 2dly, In the text of the old *Coustumier* of Normandy, c. 34., the relief of a baron is stated to be 100 livres; and in the Glossary the relief of an earl is said to be 500 livres. By the laws of the Conqueror the relief of an earl consisted of eight horses, &c., and that of a baron of four horses, &c. 3dly, In Bracton is the following passage:—*Quale sit rationabile relievium antiquum de feodo militari distinguitur in Charta*

Lib. ii. c. 36. fo. 84. a.

Libertatum, c. 2. *Scil' de comitatu integro dandæ sunt* c. *libræ de herede comitis, pro relevio, et de herede baronis pro baronia integra* c. *marcas.* And this is the reading in the copy of *Magna Charta* published by lord Coke, which is adopted by him, and by all the other writers of that age. 2 Inst. 7. 1 Inst. 83. 7 Rep. 33. b. 2 Roll. Ab. 516.

§ 43. It appears, however, from Madox's History of the Exchequer, that in the reign of king Henry III. the sum of one hundred pounds was required for the relief of a barony. So that it was a matter of considerable importance to ascertain whether a person held his lands *per baroniam*, or by the service of a certain number of knights only.

§ 44. In 9 Hen. III. Walter de Clifford was charged with 100*l.* for his relief, as for a barony. But it being found by inquisition that this Walter held of the king, *in capite*, by one knight's fee, and not by barony, he was acquitted of 93*l.* and half a mark, and charged for his relief with ten marks only. The words of the record are: — *Quod per inquisitionem quam rex præcepit fieri, idem Walterius tenuit de rege, in capite per feudum militis, et non per baroniam.* Mad. Exch. c. 10. § 4.

§ 45. In 40 Hen. III. the king took homage of William Longespee, son and heir of Idonea, late wife of W. Longespee, for all the lands which were Idonea's. The abbot of Pershore, the king's escheator, was ordered to take security of William, for fifty shillings for his relief. But afterwards, upon searching the roll of the exchequer, it was found that the said Idonea held of the king, *in capite*, two baronies; whereupon it was adjudged by the court of exchequer that the said William should pay to the king 200*l.* for his relief, for the said baronies. Idem. Vide Rot. Parl. vol. ii. 263.

§ 46. The different fees payable on doing homage to the king, by persons holding by barony, and by persons holding by knight service, proves the distinction between the several tenures. By the statute of Westminster 2. 13 Edw. I. c. 42., in which the fees of the marshal and chamberlain of the king's house are regulated, it is ordered by the king, that where a marshal "who asketh a palfrey of earls, barons, and others, holding by a part of a barony, where they have done homage; and nevertheless another palfrey, when they Fees on doing homage.

are made knights; the said marshal, of every earl and baron, holding an entire barony, should be contented with one palfrey, or with the price of it; such as he had used to have of old."

2 Inst. 463. § 47. Lord Coke has observed on this passage, that the ancient price of the horse of a baron, holding by an entire barony, was ten pounds; and that of a knight, having no part of a barony, was five marks.

Extent of a barony. § 48. With respect to the extent of a barony, it is said in an ancient manuscript, called *Modus tenendi Parliamentum*, that a barony consisted of thirteen knights' fees and a quarter. But though this work has been frequently referred 2 Inst. 7. to by lord Coke, and some other writers, as a genuine piece of antiquity, yet its authenticity has been controverted by Mr. Selden and Mr. Prynne; the former of whom supposes it to have been an imposture of the time of king Edward III.; and the latter makes it an invention, as late as 31 Hen. VI.

§ 49. The best ground of presumption respecting the extent of a barony is by comparing the relief due for it with the relief due for a knight's fee; for the relief being said to be a fourth part of the annual value of the feud, must have been in proportion to the *quantum* of property that descended to the heir. Now it has been stated, that in Glanville's time the relief of a knight's fee was five pounds, and supposing the relief of a barony to have been a hundred marks, as Bracton and all the writers of that time assert, a barony would consist of thirteen knights' fees, and a quarter, according to the *Modus tenendi Parliamentum*. But if the relief was 100*l.* it would consist of twenty knights' fees.

Exch. c. 10. § 4. Baron. Angl. 29. § 50. Madox observes that the baronies created by the Conqueror and his sons, were much greater than those that were created after, and consequently contained a greater number of knights' fees. A distinction was therefore made between the baronies and knights' fees of the old feoffment, that is, those that were prior to the death of king Henry I. and those that were created after; which are said to be of the new feoffment.

§ 51. Mr. Selden was of opinion that a knight's fee was never estimated by the quantity of land contained in it, or by its annual value. And that a barony never consisted of any certain number of knights' fees. In answer to the *Modus tenendi Parliamentum*, he has cited an escuage roll, which sets forth that upon the summons of all the king's barons in 5 Edward I. to Worcester, for an expedition into Wales, several persons came before the constable and marshal to present their services, many of whom held their baronies by the service of five knights only. This does not, however, prove that the services reserved upon the original creation of those baronies were not much greater. For the number of knights' fees was at that time considerably less than in the time of the Conqueror, partly owing to the alienations that had been made by the barons, and partly from the negligence of the constable and marshal, who had frequently accepted from the king's barons a much smaller number of knights than they were bound to produce. Id. § 26. Seld. Id. § 17.

§ 52. In support of the latter of these reasons, a passage from Madox's Baronia shall be transcribed: — "When the summonses *ad habendum servitium* had been issued, several of the barons and knights would appear before the constable and marshal of the king's host, and would prefer one half, a third, or may be a smaller part of their due service; the constable and marshal, for want of better information, oftentimes admitted those inferior proffers, being probably in haste to complete their army, and to march against the enemy. And when those fallacious proffers had been repeated, they served to make precedents against the king; insomuch that the baron would afterwards come into one of the king's courts, and allege that his due service was but so much, and that he did that service in such an army, and again in such an army, as appeared by the rolls of the marshalsey of the king's armies, or by certificate from the constable or marshal of those armies. And so the baron was usually acquitted against the king, even at the exchequer, for all service besides that which he had preferred and performed in the king's armies." Pa. 115.

§ 53. Although it seems highly probable that none of the

ancient baronies consisted originally of less than twenty knights' fees, yet many baronies contained a much greater number. For Madox has stated, from ancient records, some instances of baronies held by the service of forty, fifty, and even one hundred knights. Thus, although it might have been absolutely necessary that a barony should consist of at least twenty knights' fees, yet it was not restrained to that number, but might contain many more. So that there must have been a considerable inequality in the extent and value of the ancient baronies.

Baronia Angl. 91.

Mad. Exch. v. i. 321.

§ 54. By the custom of Normandy, the great fiefs were not partible. *Impartibilis dicitur hæreditas in qua divisionem nullam inter fratres consuetudo patriæ patitur sustineri. Ut feodo loricæ, comitatus et baroniæ, et sergentariæ.* In imitation of this law, a barony was considered in England as *feodum integrum*, and always designed to be kept entire, for which reason it descended to the eldest son. But in course of time it appears to have been established that where there were only female heirs to a barony, or persons claiming under females, it was divisible, like any other estate; and each of the co-heirs held his or her share *per partem baroniæ*. Thus Madox mentions instances of persons who held by a fiftieth, and even a hundreth part of a barony.

Divisible among co-heirs.

Grand Coust. c. 26

Baronia Angl. 39. 44.

§ 54. Persons who held parts of baronies were obliged to pay for their relief according to the portion which they held; as where a person held half a barony, he paid fifty pounds; and for a third of a barony, fifty marks.

§ 56. Those who held a part of a barony appear to have enjoyed some of the privileges of barons, for in the case of Sir Ralph Everden, who in 18 Edw. III. claimed to be discharged from sitting on juries; one of the judges asked him, whether he held by barony, and had been summoned to parliament as a baron? to which he answered that he held by part of a barony; whereupon he was discharged. And in the cases of the Abbot of Croyland, and Thomas de Furnival, who in 19 Edw. III. were amerced as barons, they pleaded that they did not hold *per baroniam, nec per partem baroniæ.*

Assise Mich. 48 Edw. 3. 18.

Mad. Exch. c. 14. § 2.

§ 57. Where a partition was made of a barony between

daughters or sisters, the *caput baroniæ* was allotted to the eldest, *jure esneciæ*. Thus we read in Bracton:—*De hoc autem quod dicitur, quod de feodo militari veniunt in divisionem capitalia messuagia, et inter cohæredes dividuntur, hoc verum est, nisi capitale messuagium illud sit caput comitatus, propter jus gladii, quod dividi non postest, vel caput baroniæ, castrum vel aliud beneficium, et hoc ideo ne sic caput per plures particulas dividatur, et plura jura comitum, vel baroniarum deveniunt ad nihilum; per quod deficiat regnum, quod ex comitatibus et baroniis dicitur esse constitutum.* Pa. 76. a.

§ 58. With respect to the number of ancient baronies, Matthew Paris, or his continuator, relates, that king Henry III. being at St. Albans, and having occasion to speak of his brother Richard, earl of Cornwall, who was chosen emperor of Germany, reckoned first the names of the kings of England that were canonized for saints, and afterwards the names of the barons of England, that he could remember, which he found to be two hundred and fifty. Camden's copy had only one hundred and fifty; and Selden observes that this latter number was probably the true reading; it appearing from the Close Rolls, 47 Henry III. that the temporal barons by tenure, being about one hundred and fifty, were called in that year by several writs, to be present, *cum equis et armis, ad habendum servitium.* Number of baronies.

§ 59. This calculation must, however, be understood to apply only to the period when it was made, and to the *barones majores* only. For in the time of the Conqueror and that of his sons, when every tenant *in capite* who had a manor was a baron, the number must have been much greater.

§ 60. But whatever was the number of baronies at that time, it could not be much increased, for no person could create a barony but the king, and that only by a grant of a portion of the royal demesnes, which was seldom done. But it was usual to regrant such baronies as escheated or were forfeited. For these were not destroyed by coming into the king's hands, but continued to be baronies, *in manu regis*, and as such might be granted out again, to hold, as formerly, *per baroniam.* Mad. Exch. c. 10. § 2.

Honors.

§ 61. It has been stated that there were in Normandy several noble fiefs which were called honors; in imitation of these, many honors were created in England by the Conqueror, which are thus described by Spelman:—*Honor ab Anglo Normannis dictum videtur uniuscujusque majoris baronis feudale patrimonium, seu baronia; adjuncto plerumque sedis ejusdem capitalis, aut ipsius interdum baronis nomine. Denique uti manerium plurimis gaudet (interdum feudis sed plerumque) tenementis consuetudinibus servitiis, &c. Ita honor plurima complectitur maneria, plurima feoda militaria, plurima regalia, &c. Dictus etiam hic olim est beneficium seu feudum regale; tentusque semper a rege in capite.*

Gloss. voce Honor.

§ 62. It appears from this description of an honor, that it was exactly similar to a great barony, of which inferior manors were held. It was subject to the same relief as a barony; and lord Coke says, an honor is the most noble seignory of all others, originally created by the king, but might afterwards be granted to others.

Mad. Exch. c. 10. § 4.

1 Inst. 108. a.

§ 63. It is said by Scrope, in Itin. Temp. Edw. III., that when the king grants an honor with the appurtenances, it is more high than if a manor was granted with the appurtenances; for to an honor by common intendment appertain franchises, and by reason of those liberties and franchises, it is called an honor.

2 Roll. Ab. 72.

Hardress. Rep. 423.

§ 64. In the returns made by the king's immediate tenants, upon the marriage of Matilda, the eldest daughter of king Henry II., which are contained in the *Liber Niger Schacarii*, published by Hearne, the following honors are mentioned. The honor of William de Tracy, in Devonshire; the honor of Bardestaple, in the same county; the honor of Warringford, in Berkshire; the honor of Berchamstede, in Hertfordshire, and the honor of Clare, in Suffolk. But there were a great many more honors, of which the names are mentioned in Cowell's Dictionary.

Baron. 3.

§ 65. Madox says there were in England certain honors which were often called by Norman and other foreign names; that is to say, sometimes by the English and sometimes by the foreign name. This happened when the same person was

lord of an honor in Normandy, or some other foreign country, and also of an honor in England. For example, William de Forz, de Force, or de Fortibus, was lord of the manor of Albemarle in Normandy: he was also lord of two honors in England, the honor of Holdernesse, and the honor of Skipton in Craven. These honors in England were sometimes called by the Norman name, the honor of Albemarle.

In like manner, the earl of Britanny was lord of the honor of Britanny in France, and also of the honor of Richmond in England. The honor of Richmond was sometimes called by the foreign name, the honor of Britanny, or the honor of the earl of Britanny.

§ 66. Every honor had a principal seat or mansion-house upon it, which was called the *caput honoris*. It was commonly a castle, and, like a barony, if there was a town situated within its precincts, it could not be the *caput honoris*. Thus the town of Richmond in Yorkshire was part of the demesnes of the honor of Richmond; but the castle was the *caput honoris*. No wonder, therefore, says Madox, that in the register of that honor little or no mention was made of the town, while the castle was accurately described; and the several officers, wards, and services of the castle were there particularly set down. For the castle was in its nature baronial, and superior, but the town was burgensic and inferior. Mad.Bar.7.

§ 67. Madox observes, that when a great seignory or honor came to the crown by escheat, it became vested in the king in the same plight to many purposes, as it was before vested in the tenant, conformably to the provisions of Magna Charta, c.31., and great care was taken by the king's revenue officers to distinguish between the king's original inheritance, and these honors or escheats. It was of importance to the crown, as well as to the tenants who held lands of these honors, to have that distinction preserved. For example, when the honor of Gloucester devolved to the crown by escheat, John de Torrington, a tenant in chivalry, holding of the king, as of that honor, was not bound to do personal service. Baron. 12. Ante.

§ 68. In the reign of king Henry VIII. an honor appears to have been considered as an illustrious manor or lordship, or several manors united, having a capital seat or mansion. Thus certain manors belonging to the crown were then created honors by act of parliament; such as the manors of Hampton
Id. 8. Court, Ampthill, and Grafton. But Madox observes, that by those acts honors were created in name, and those places acquired some of the properties of honors, but in truth became honors of a new sort. For the essential property of an honor vested in the king was, to be a barony escheated. Now if Hampton Court was not an escheat, or a barony escheated before the making of the act, it could not become an escheat or barony escheated by the act; which could not alter its nature. If a manor or estate vested in the crown was a part of the king's original inheritance, if it never was granted to an earl or baron, and did not come to the crown by escheat, it was not properly an honor. It might, indeed, be created an honor, or nominal honor, but such creation could not alter the nature of it, or make it an honor in fact, that is, it would not make it a baronial estate, if not so before.

All tenants per baroniam were not peers.

§ 69. All the proprietors of these baronial estates, or land baronies, were entitled to sit in the *Magnum Consilium*, or parliament, till the reign of Henry III., who made a law, which
c. 1. § 43. has been already stated, that no person should come to parliament without a writ of summons from the king; and though it does not appear that this law applied to the principal
Id. barons, yet it is probable that the crown frequently availed itself of it, by omitting to summon the lesser barons, or those
Rot. Parl. v. ii. 368. who acquired estates held *per baroniam*. For some passages in our ancient records prove that after the reign of Henry III. all tenants *per baroniam* were not parliamentary barons.

Rot. Parl. v. ii. 130. n. 32.

§ 70. Thus in 15 Edw. III. to a complaint made by the clergy, that the king's officers claimed tithes of them, his majesty answers: "*Que ceux qui teignent du roi per baronie, et deyvent venir au parliament per somonse, paient le neofisme.*"

Idem, Pa. 258. No. 28.

And in a petition of the commons in 28 Edw. III. it is stated that the tenants of lords who held by barony, *and* were

summoned to parliament, claimed to be discharged from contributing to the wages of knights of the shire.*

§ 71. In lord Coke's comment on *Magna Charta*, he says, 2 Inst. 5.
" It is to be understood that if the king give land to one, and his heirs, *tenendum de rege per servitium baroniæ*, he is no lord of parliament until he is called by writ to parliament. And Mr. Elsynge, who was clerk of parliament in the reign of king James I., says, it appears from the *Inquisitiones post Mortem* in the Tower, that many estates were held *per baroniam* by persons who were not reputed peers.

§ 72. The town of Burford, in Shropshire, appears from Spelm. Gloss. voce Baro.
an inquisition taken in 40 Edw. III. to have been held of the king, by the service of finding five men for the army of Wales; *et per servitium baroniæ;* whence the proprietors were called barons of Burford, but were not parliamentary barons.

§ 73. Madox, in a note to the case of Thomas de Furnival, Ante 1.
observes, that holding by barony, and being summoned to attend among the barons in parliament, were in those days very different things. And Mr. Selden, in his argument for the earl of Kent, respecting the barony of Grey, of Ruthyn, says, " It is a rule that an honor or barony, or a tenure by barony, doth not enforce a conclusion that the possessed is a baron of parliament."

§ 74. Mr. West observes, that in consequence of the law of Pa. 28.
king Henry III. which has been already stated from Camden, the circumstance of holding *per baroniam* did not make a parliamentary baron. And though every lord of parliament was a baron, yet every baron was not a lord of parliament. He cites the case of Sir Ralph Everden, who was discharged Ante 56.
from sitting on juries, because he held by a part of a barony; though it did not appear from the writs of summons, that any man of that name was ever summoned to parliament; and says this privilege was not peculiar to an attendance on parliament, but incident to a tenure *per baroniam.* For

* Sir R. Cotton, in his Abridgment of the Records, has translated it *or*, but it is clearly *and* in the printed Rolls.

although no barons had a right to come to parliament, but only those to whom writs were sent; yet the lesser barons did, for some years, preserve all the other privileges incident to their tenure.

But the dignity of a baron was annexed to some estates.

§ 75. There were, however, some estates to the possession of which the dignity of a baron, with a right to be summoned to, and sit in parliament, was annexed, conformably to the principles of the feudal law, and the usage that then prevailed in France.

§ 76. Thus the dignity of a parliamentary baron was formerly annexed to the manor or barony of Kingston Lisle in Berkshire, as appears from letters patent under the great seal, made with the authority of parliament, in 22 Hen. VI., in which it is expressly declared that the possessors of that manor had been, by reason of that possession, barons and lords Lisle; and by that name had place and seat in parliament from time immemorial.

§ 77. These letters patent, after reciting that Warinus, lord Lisle was seised of the manor of Kingston Lisle, from whom it descended to John Talbot, as one of his heirs; proceeds in these words*: — *Nos nedum præmissa verum etiam qualiter præfatus Warinus et omnes antecessores sui, ratione dominii et maner. prædictorum nomen et dignitatem baronis et domini de Lisle, a tempore quo memoria hominum non existit obtinuerunt et habuerunt, ipsique et omnes successores sui ab eodem tempore per hujusmodi nomen, loca et sessiones et alias pre-eminencias in parliamentis et consiliis regiis, ut cæteri barones regni Angliæ a toto tempore prædicto habuerunt et obtinuerunt, &c. &c. Volumus et concedimus per presentes, eidem Johanni, filio Johannis, quod ipse et hæredes sui domini dictorum dominii et manerii de Kingston Lisle ex nunc domini et barones de Lisle et barones nobiles et proceres regni nostri habeantur, teneantur et reputentur, habeantque nomen stilum titulum et honorem baronum et dominorum de Lisle, ac sessiones in parliamentis et consiliis nostris, et*

* I have transcribed this and the following patent from the case of the barony of Lisle, published in 1790, by Abraham Atkins, Esq. the then possessor of the manor of Kingston Lisle; which is there said to have been drawn up by the Honorable Hume Campbell.

hæredum nostrorum, ac aliis locis quibuscunque inter alios barones regni nostri cum omnibus et omnimodis dignitatibus ac pre-eminentiis statui baronis regni nostri prædicti; et præsertim statui dictæ baroniæ de Lisle ab antiquo pertinentibus sive spectantibus eisdem modo et forma in omnibus et per omnia tam in hujusmodi sessionibus quam cum omnibus et omnimodis aliis pre-eminentis et dignitatibus quibuscunque prout prædictus Warinus seu aliquis alius baroniam et dominium prædictam ante hæc tempora habens et occupans, habuit et tenuit. Habendum et tenendum nomen stilum titulum et honorem supradicta, una cum sessionibus supradictis in parliamentis consiliis et locis prædictis, nec non omnibus et omnimodis dignitatibus et pre-eminentiis supradictis eidem Johanni, filio Johannis, hæredibus et assignatis suis, imperpetuum, &c.

§ 78. By other letters patent, in 15 Edward IV., reciting, as in the former ones, and that Edward Grey was seized in right of Elizabeth, his wife, who was the grand-daughter and heir of the said John Talbot, of the lordship and manor of Kingston Lisle; it is granted that the said Edward, and his heirs, of the body of the said Elizabeth, being lords of the said lordship and manor of Kingston Lisle, should be barons de Lisle, and should sit in parliament with the other barons of the realm: and the name, style, title, and honor of baron Lisle is granted to him, to hold to him and his heirs on the body of the said Elizabeth begotten.

§ 79. The castle and honor of Berkeley were granted by king Henry II. to Robert Fitzharding, to hold to him and his heirs *per baroniam* from whom it descended to Thomas lord Berkeley, who died in 5 Hen. V., and by the inquisition taken at his death it was found that the castle and manor of Berkeley were entailed by the grandfather of the deceased, by a fine levied in 23 Edward III., on himself and the heirs male of his body; and as the deceased left only a daughter, they descended on James de Berkeley, as cousin and next heir male to the deceased. And Dugdale observes that this James, by virtue of the said entail, enjoyed the said castle and barony of Berkeley, and was summoned to parliament

Barony of Berkeley, Dugd. Bar. v. i. c. 361.

as lord Berkeley in 9 Henry V., and to all the parliaments that were held in the time of king Henry VI.

§ 80. In the reign of Henry VII., William lord Berkeley, having no children, covenanted to assure the castle and manor of Berkeley, for want of issue of his own body, to king Henry VII. and the heirs male of his body, and for default of such issue to his own right heirs; and settled the same accordingly.

In consequence of this settlement, William lord Berkeley obtained the office of earl marshal and title of marquis to himself and the heirs male of his body; and, dying without issue, the castle and manor of Berkeley devolved to the crown.

Maurice de Berkeley, the brother and heir of William, never had the dignity of baron Berkeley; but, having recovered several estates belonging to the family, he died in 22 Henry VII., leaving Maurice, his eldest son, who was summoned to parliament in 14 Henry VIII.; but had not the place of his ancestors, in regard that the castle of Berkeley and those lordships belonging thereto, which originally were the body of that ancient barony, then remained in the crown, by virtue of the entail; and therefore he sat in parliament as a new baron, in the lowest place; of which, says Dugdale, he had no joy, considering the eminency of his ancestors, and the pre-eminency which they ever had. Though in point of prudence he was necessitated to submit, being thereunto persuaded by his counsel. Upon the death, however, of king Edward VI., who was the last heir male of the body of Henry VII., the reversion of Berkeley castle and all the estates limited by William to that king, fell into the possession of Henry de Berkeley, as the right heir of William lord and marquis of Berkeley; in consequence of which he was summoned to parliament in 4 & 5 Philip and Mary, and was seated in the place of the ancient barons of Berkeley.*

Dyer, 102 a. pl. 82.

Journ. v. i. 516.

* In 1661, George Lord Berkeley petitioned his majesty for his place in parliament above and before lord Delaware, stating that Robert Fitz-

§ 81. Sir Thomas Fane, having married Mary, the only daughter and heir of the lord Abergavenny, claimed, in 1604, the barony of Abergavenny in right of his wife, as a barony by writ, and showed that king Richard II. had caused a writ of summons to be directed to Sir William Beauchamp, to attend his parliament at York, where he appeared, and sat in the said parliament as a baron. That the said dignity descended to Edward Neville, the father of the said Mary, who therefore as his heir general became entitled to the dignity. Barony of Abergavenny, Collins, 61.

Sir Edward Neville, who was the nephew and heir male to Henry the last lord of Abergavenny, claimed the dignity under the will of George lord Bergavenny, made in 27 Henry VIII., by which he entailed the barony of Abergavenny, with all his other castles, lordships, honors, &c. on himself and the heirs male of his body, remainder to Sir Edward Neville and the heirs male of his body; and deduced his pedigree as heir male of the body of Sir Edward Neville, to whom the estates so entailed had descended by the failure of heirs male of George; and insisted that the barony was annexed to the possession of the castle of Abergavenny.

The case was referred by king James I. to the house of lords, where it was argued for seven days.*

Serjeant Doddridge, who was counsel for Sir Edward

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harding, grandson to the king of Denmark, the petitioner's lineal ancestor, had the honor of Berkeley granted to him and his heirs, by king Henry II., to hold by barony; that from the said Robert descended William, who being created marquis Berkeley by king Edward IV., and entailing the said honor, for want of issue male of his own body, upon king Henry VII.; and the issue male of his body died without issue, whereby the said honor came to and was in the crown, until the death of king Edward VI., grandson and heir male to the said king Henry VII. That Sir Maurice Berkeley, knt., nephew and heir to the said marquis, being summoned to parliament in 14 Henry VIII., did by reason of that entail, sit no otherwise than as a puisne baron. And that upon the death of king Edward VI. without issue, Henry lord Berkeley, nephew and heir to the said Maurice, being not till that time in a capacity to challenge the place of his ancestors, was then under age. (Journ. v. 11. 257.) No resolution appears to have been made on this petition.

* It appears from a MS. in the Harleian Collection, No. 1749. That this case was heard before the earl of Essex as earl marshall, assisted by the two chief justices and several peers.

Neville, stated the question to be, whether the barony of Abergavenny, with the title and dignity, was descended unto the lady, being the daughter and heir of Henry Neville, the last baron of Abergavenny, or unto the special heir male, to whom the castle of Abergavenny, being anciently the head of the barony, was descended; wherein two things were to be considered: 1°, Whether, within the realm of England, there were any baronies by tenure; and whether *baronia sit dignitas annexa feodo:* that is, whether the heir male having the castle holden *per baroniam* should have the title; or the heir general, who had not the castle. 2°, Whether by former precedents it might be shown that this barony had been guided by the lawful descent of the castle of Abergavenny, or whether the same had gone to the heir general, sundered from the castle.

Those, who denied the existence of baronies by tenure, objected: first, that if there were any, then the grantee of them must hold by the same tenure as the feoffor, but that was *per baroniam;* and therefore if such grant were made to persons ignoble, they then would be noble, which was absurd. Secondly, it was evident that many manors which in former times were holden *per baroniam* were then in the possession of mean persons, who never claimed the title of baron. Thirdly, that there were some ancient barons, who had sold their castles and yet retained their dignities. — To these objections the serjeant answered: First, that if a baron by tenure aliened without licence, he forfeited his estate; which was seised by the king, and so the dignity was extinguished. If he aliened with the licence, such alienation was made, either for the continuance of the dignity in his blood, by entailing it to some branch of his family, or to a stranger.

In the first case he mentioned several instances where the dignity was allowed to pass, and be enjoyed by the alienee; particularly those of the earldoms of Warwick and Arundel, and the barony of Berkeley. And in the second case, he mentioned several instances where the alienee had borne the name, and had the dignity of a baron in respect of such barony so aliened. And where such alienee had no dignity

Ante.

before, he had, in respect of that been summoned to parliament, and enjoyed the dignity. Vide infra, c. iv.

To the second objection he answered, it was true that ancient baronies were then in the hands of men, ignoble but the reasons were two-fold. 1°, Because they had been aliened by licence to them. 2°, Because such manors had come to the crown by way of reversion, escheat or forfeiture; and were granted again, reserving other services.

As to the third objection, that ancient barons had aliened their castles, and still retained their dignities; he answered that such baronies were created by writ, in which the persons summoned were named by the principal place of their abode; and therefore, though they had aliened their castles or manors from which they were named, yet they retained their dignities.

The serjeant then proceeded to show that the castle and manor of Abergavenny were originally granted to be holden *per baroniam*, *sive* grand serjeanty; that the barony was a very large seignory, and had petty barons holding thereof; and that the title and dignity had *de facto* gone with the castle.

It is said in the Journals — "That the question seemed "nevertheless not so perfectly and exactly resolved as might "give clear and undoubted satisfaction to all the consciences "or judgments of all the lords, for the precise point of right; "and yet so much was shewn and alledged on each side, as "in the opinion of the house, if it might stand with the "king's good pleasure and grace, made them both capable "and worthy of honor. It was therefore moved and so "agreed, that information should be given unto the king's "majesty of all the proceedings of the said court, in the "matter; and that humble suit should be made to his "majesty from the lords, for the ennobling of both parties "by way of restitution; the one to the said barony of Aber-"gavenny, and the ancient place belonging to the same, and "the other to the barony of Le Despencer." Vol. ii. 345.

King James agreed to the proposal of the house; but nevertheless required the lords to proceed to determine upon

which of the said candidates the dignity of the barony of Abergavenny should in their judgement be settled. The question was proposed by the lord chancellor, whether the heir male should have the dignity of Bergavenny; and it was resolved by the greater number of voices for the heir male, that Neville should be restored to the barony of Bergavenny, and settled therein.

A writ of summons was in consequence issued to Edward Neville, and he took his seat in the house as baron Bergavenny.

Barony of Roos, Printed Case.

§ 82. The last case in which a barony by tenure was endeavoured to be established, was that of Roos, or Ros, of Hameslake Trussbutt and Belvoir. A claim was made by lady Henry Fitzgerald to a coheirship in this barony, in 1805, as having been originally created by a writ of summons in 49 Henry III., addressed to Robert de Ros, from whom it descended through a female heir to the family of Manners, afterwards created earls and dukes of Rutland.

Lady Henry Fitzgerald claimed to be one of the coheirs of Lady Frances Manners, who was one of the two daughters and coheirs of John the fourth earl of Rutland. The claim was opposed by the duke of Rutland, upon the ground that this was a barony by tenure; for where an ancient baron, holding a baronial estate, that is, a castle or manor held of the king *in capite per baroniam*, was summoned to parliament, his title did not arise from the writ of summons, but from his barony, and he became a baron by tenure.

Collins, 320.

That dignities of this kind went with the estate to which they were annexed, and where such estates descended to the heir general, the dignity descended in the same manner, but where the estates were entailed on the heirs male, the dignity descended to such heirs; as in the cases of the earldom of Arundel, the baronies of Berkeley and Abergavenny.

That Robert de Ros, when summoned to parliament in 49 Henry III., was seised of the manors of Hameslake and Trussbutt in his own right, and of the castle and honor of Belvoir in right of his wife, who was the daughter and heir of William de Albini. That all these manors were held of

the crown *in capite per baroniam.* That the manor of Ros, whereof he was also seized at that time, was not a baronial estate, being held of lord Fitzhugh by knight service.

That Robert de Ros, being thus seized of three baronies at the time when the writ of summons of 49 Henry III. was addressed to him, must be taken to have been thereby recognised as an ancient baron, in right of those baronies which he then held, and not to have been created a baron by that writ.

That although the baronies of Hameslake and Trussbutt had been aliened by the ancestors of the duke of Rutland, yet the honor and castle of Belvoir had always been in their possession, and had descended from them to the duke of Rutland, from which he contended that though the baronies of Hameslake and Trussbutt might be extinct, yet that the barony of Roos of Belvoir was a subsisting dignity, annexed to the seisin and possession of the honor and castle of Belvoir.

Mr. Adam, as counsel for lady Henry Fitzgerald, argued that the writ of summons of 49 Henry III. created a barony descendible to heirs general. He did not deny generally the existence of dignities by tenure, but he conceived that the only dignities of this kind were those of Arundel and Abergavenny.

He contended that a tenure *per baroniam* was not of itself parliamentary, and did not, therefore, give a right to sit in parliament, unless some acts connected it with a place in the house of lords. That there must be a reference in the writ of summons to the territory. In the present case, there was no reference; the writ did not mention Hameslake, Trussbutt, or Belvoir: if it alluded to any territorial possession, it was to the manor of Ros. The writ was directed *Roberto de Ros*, without reference to any territorial possession; and the family being then possessed of several baronies, the writ alone did not make these baronies parliamentary: and though Hameslake was mentioned in subsequent writs, yet Trussbutt and Belvoir were not mentioned. The inserting of Hameslake was evidently for the purpose of distinguishing the

person summoned from some other person of the same name. And the baronial estate of Hameslake had long been alienated by an ancestor of the duke of Rutland.

The attorney general (Sir Arthur Piggot) observed that the duke of Rutland's counsel had stated an argument to this effect: That the writ which was issued in 49 Henry III. to Robert de Ros created a barony by tenure, if, at the time the writ issued, it could be shown that Robert de Ros had any barony in him. This argument would make a writ create a barony by tenure, if it could be shown that at the time when the writ issued, the person to whom it was addressed had any barony in him, without a reference to any word in the writ which connected the person with the tenure.

In the case of Arundel, what gave the territorial dignity? it was the possession of the castle. What in the case of Abergavenny? it was the possession of the castle and honor that gave the title. In Berkeley the same. The castle and honor was that which in all those cases made the territorial dignity. But upon what grounds could it be said in this case that the writ created a barony and territorial honor; by reference to nothing that was in the writ; by no reference to any castle or barony of Roos, or any other castle or barony. That the committee was to take the writ, in which there was no reference to Belvoir, Trussbutt, or Hameslake, and to enquire *dehors* the writ, whether the person had any barony whatever, and if he had, then to turn that, contrary to the universal construction that had prevailed, into a territorial dignity. Robert de Ros had three baronies in 49 Henry III. Was he to say: It is true there is nothing in this writ that has any reference to the property I possessed; but I am at liberty to say that those three baronies were the motive which induced the king to issue the writ of summons; and I may apply it as I please. I will alienate two of the three baronies, and still preserve a territorial honor, annexed to the barony that is not alienated.

It would be necessary for the duke of Rutland to show some cases to prove that though a writ of summons had no

reference to territory, yet if the person summoned was possessed of a territory, it should now be construed for the first time to be a territorial dignity; but there was no instance of such a construction. There were no words in the writ that could apply to any thing but the manor or estate of Ros, and that was not a barony, for it was not held of the crown *in capite*.

The house of lords resolved, "that after hearing what "had been alleged and proved on the part of the duke of "Rutland, the said duke was not entitled to the barony "claimed on the part of the coheirs of Robert de Ros." 9 May, 1806.

§ 83. In the time of the Saxons the bishops and abbots held their lands free from all secular services, except the *trinoda necessitas*; namely, *expeditio contra hostem, pontium et arcium contractio, et reparatio*. But soon after the establishment of the Normans, they were charged with the same obligations of military service as laymen. Thus Matthew Paris says of Will. I., *Episcopatus quoque et abbatias quæ baronias tenebant, (in pura et perpetua elymosina*) et eatenus ab omni servitute seculari libertatem habuerunt, sub servitute statuit militari; irrotulans singulos episcopos et abbatias pro voluntate sua, quot milites, sibi et successoribus suis, hostilitatis tempore voluit a singulis exhiberi. Et rotulas hujus ecclesiasticæ servitutis ponens in thesauris, multos viros ecclesiasticos huic constitutioni pessimæ reluctantes, a regno fugavit.* Ecclesiastical baronies, Seld. Id. §. 19.

§ 84. In consequence of this alteration the bishops became tenants *in capite per baroniam*, and were of course bound to attend the *curia regis*, which at that time was considered as a burthensome service. It is therefore probable that they did not willingly acquiesce in this change; for when the immunities of the church were so much restrained, by the Constitutions of Clarendon, it was expressly declared, that the archbishops, bishops, and great abbots, should hold their lands as baronies, and should attend the king's court, as well as the temporal barons.

* These words were not in the manuscript used by Selden, but he inserted them upon the authority of Camden, and the latter part of the first chapter of the seventh book of Glanville, Seld. Id. s. 19.

Spelm. Councils, Seld. Id. § 20.

§ 85. *Archiepiscopi, episcopi, et universi personæ regni qui de rege tenent in capite, habeant possessiones suas de rege, sicut baroniam; et inde respondeant justitiariis et ministris regis; et sequantur et faciant omnes consuetudines regias; et sicut cæteri barones debent interesse judiciis curiæ domini regis, cum baronibus, usque perveniatur in judicio ad diminutionem membrorum, vel mortem.*

§ 86. The bishops were, however, always exempted from doing homage for their baronies, but were bound to take the oath of fealty. Thus Glanville says: "*Episcopi vero consecrati homagium facere non solent domino regi, etiam de baroniis suis; sed fidelitatem cum juramentis interpositis ipsi prestare solent.*" This kind of fidelity is, however, now called homage, and is done by every bishop to the king.

Lib. 9. c. 1. Littleton, § 86.

§ 87. The bishop of Sodor and Man is the only one who does not sit in the house of lords, and the reason given by Spelman is, because he does not hold immediately of the king, but of the lord of Man; so that he is not one of the king's tenants *in capite*.

Gloss. voce Baro.

§ 88. The Constitutions of Clarendon extended to all the abbots and conventual priors then holding *in capite*, who were thereby bound to attend parliament when summoned. But lord Coke observes, that unless an abbot or prior held his possessions *per baroniam*, the king had no right to summon him to parliament; nor was he bound to obey such summons, or to perform that service; because *quoad secularia*, he was *mortuus in lege*, therefore not capable to have voice in parliament. And though such person had often been called by writ, and, *de facto*, had voice and place in parliament, yet if, *in rei veritate*, he held not *per baroniam*, he ought to be discharged of that service, and to sit in parliament no more. This doctrine has been confirmed by the two following cases:

Rot. Parl. v. iii. 236.

4 Inst. 44. Seld. Id. § 24.

Seld. Id. § 24.

§ 89. In the reign of king Edward II., the abbot of St. James, near Northampton, having been summoned to a parliament which was held at York, sent a canon of his house as his proxy, who, upon shewing to the chancellor that the said abbot *nihil tenet de rege in capite, nec per baroniam, sed tantum in puram et perpetuam eleemosynam*, required that his

name should be erased from the list of the persons summoned, which was done accordingly.

§ 90. In the reign of king Edward III. the abbot of Leicester obtained letters patent from that prince, reciting that the abbey of Leicester was originally founded by Robert Fitz Robert de Melan, earl of Leicester, *in puram et perpetuam eleemosynam.* That the patronage thereof came to king Henry III. by the forfeiture of Simon de Montfort; and that the abbot did not hold any lands of the crown *per baroniam, seu alio modo per quod ad parliamenta seu consilia nostra venire teneatur;* nor had any of his predecessors (before the 49 Hen. III., when all the abbots and priors were voluntarily summoned) been summoned. The king granted, for him and his heirs, that the said abbot and his successors should for ever be exonerated from coming to parliament. Seld. Id.

§ 91. These cases appear to furnish an additional proof that the tenure *per baroniam* was a species of grand serjeanty; and that the service due for it was, originally, suit to the *curia regis;* and afterwards, attendance on parliament, when summoned by the king's writ. Ante, 1.

§ 92. The right of archbishops and bishops to sit in parliament is not derived from their ecclesiastical dignities, but from the temporal possessions to which they become entitled in right of their sees; for it only commences when they have obtained the investiture of those possessions. And where a spiritual person is translated from one see to another, he has no right to sit in parliament during the interval; so that their seats in parliament are strictly derived from tenure; and they are not styled peers of the realm, but only lords of parliament.

§ 93. The dignity of earl was originally annexed to the possession of a particular tract of land; and there appear to have been three different kinds of earldoms. The first was where the dignity was annexed to the seisin and possession of an entire county, with *jura regalia.* In that case the county became palatine, and the person created earl thereof acquired royal jurisdiction, and royal seignory. By reason of the royal jurisdiction the earl palatine had all the high courts, and Earldoms by tenure. 4 Inst. 204. Davie's Rep. 168.

officers of justice, which the king had, with a civil and criminal jurisdiction; and by reason of his royal seignory, he had all the royal services and royal escheats which the king had; so that in fact a county palatine was in every respect a feudal kingdom in itself, but held of a superior lord.

§ 94. Thus the Conqueror granted the county of Chester to Hugh d'Avranche, to hold to him and his heirs, *adeo liberam ad gladium sicut ipse rex totam tenebat Angliam ad coronam suam.* And lord Coke says, that by this general grant Hugh earl of Chester had *jura regalia* within the county, and consequently had *comitatum palatinum*, without any express words; by force whereof he created eight barons to hold of him, who constituted his court, which was the first visible mark of a county palatine; and also thereby acquired such a jurisdiction, that no inhabitant of that county ought to be called or compelled by any writ or process to appear to answer to any matter or cause out of the same county, except in cases of treason or error; and that the king's writ doth not come, or ought to be allowed or used, within the said county palatine, but under the seal of the said county.

Seld. Ed. § 8. 4 Inst. c. 37.

§ 95. The earl of Chester's barons had such large estates, that they gave out portions of them, to be held of themselves, by which means they created manors, of which they were lords. And in Sir Peter Leicester's History and Antiquities of Chester, there is a charter of Ranulph earl of Chester made about the year 1218, by which he grants a jurisdiction to each of his barons, in all cases except criminal ones, in the following words: — *Unusquisque eorum curiam suam habeat liberam, ab omnibus placitis et querelis in curia mea motis; exceptis placitis ad gladium meum pertinentibus.*

§ 96. The county of Pembroke was an ancient county palatine, and the earl thereof was *comes palatinus*, having *jura regalia*, with all things belonging to a county palatine. And by a charter of king Edward III. this county was granted to Lawrence lord Hastings, as the heir to Aymer de Valence, by the following words: — *Quod quidem, quantum in nobis est, sibi confirmamus ratificamus, et etiam approbamus; volentes et concedentes ut dictus Laurentius prærogativam et honorem comitis palatini in terris*

Seld. Id. § 8. 4 Inst. c. 40.

quas tenet de hæreditate dicti Audomari, adeo plene, et eodem modo habeat et teneat, sicut idem Audomarus illas habuit et tenuit, tempore quo decessit.

§ 97. The bishops of Durham, since the conquest, have had *omnia jura regalia, et omnes libertates regales, infra libertatem suam Dunelmensem.* And in the reign of king Edward III. Thomas bishop of Durham, to an information against him, pleaded, *Quod ipse est comes palatinus, et dominus regalis cujusdam terræ vocatæ le bishoprique de Duresme, et habet omnia jura regalia quæ ad comitem palatinum, et dominum regalem pertinent, per se, justitiarios et ministros suos exercenda.* 4 Inst. c. 38. Seld. Id. § 8.

§ 98. The criminal jurisdiction of earls palatine was restrained by the statute 27 Hen. VIII. c. 24., by which it was enacted that no person should pardon felonies but the king, and that all original and judicial writs, and all indictments for treason, felony, and trespass, in every county palatine, and other liberty, should be made only in the name of the king, and his heirs, with an exception in favour of the bishops of Durham.

§ 99. The second kind of earldom was, where the king created a person earl of a county, without granting him the seisin and possession of the county itself, or any of the franchises of an earl palatine; but only the third part of the profits, or *tertium denarium*, arising from the pleas of the county court; of which Selden has given two instances in the following charters: Ante, c. i.

§ 100. *Ego Matildis, filia regis Henrici, et Anglorum domina, do et concedo Ganfredo de magna villa pro servitio suo, et heredibus suis post eum hereditabiliter, ut sit comes Essexia, et habeat tertium denarium vicecomitatus de placitis, sicut comes habere debet in comitatu suo.* Seld. Id. § 10.

§ 101. *Henricus rex Angliæ, &c., sciatis me dedisse et concessisse comiti Alberico in feodo et hæreditate tertium denarium de placitis comitatus Oxenfordscyre ut sit inde comes. Quare volo et firmiter præcipio quod ipse et hæredes sui habeant inde comitatum suum ita liberè et quietè et honorificè sicut aliquis comitum Angliæ liberius et quietius et honorificentius habet.*

§ 102. By these charters the grantees became earls of Essex

and Oxford, though they had not counties palatine. And in some cases, besides the *tertium denarium*, castles and lands were given. Thus in the charter by which the empress Maud created Milo de Gloucester earl of Hereford, which has been published by Rymer, and is one of the most ancient extant, the words are—*Sciatis me fecisse Milonem de Gloucestria comitem de Hereford, et dedisse ei motam Hereford cum toto castello, in feodo et hereditate sibi et heredibus suis, tenendum de me et heredibus meis. Dedi etiam ei tertium denarium placitorum totius comitatus Hereford. Dedi etiam ei tria maneria in ipso comitatu, &c.*

Fœd. v. i. 8.

§ 103. The third kind of earldom was where the crown granted a considerable tract of land to a person to hold *per servitium unius comitatus.* Thus, in the Year Book of 10 Hen. VII. pla. 5., one of the judges says:—"When an earl is created, and certain lands given to him in his patent; by this means he has his name given to him, and also the lands; and these lands constitute the county, that is, the earldom." But lord Coke says, if manors, lands, or an annuity be granted to the earl for the support of his dignity, he will not hold those manors, lands, &c., *per comitatum*, or *nomine comitis.*

2 Inst. 9. *infra.*

§ 104. It is said by William of Malmesbury that king Stephen created many earls, and much wasted the crown revenue upon them. *Multos comites qui ante non fuerant instituit. Applicatis possessionibus et redditibus quæ proprio jure regi competebant;* and that several earls made by him were afterwards called imaginary or false earls; for king Henry II., upon resuming the possessions of the crown, at the beginning of his reign, *Deposuit quosdam imaginarios et pseudo comites, quibus rex Stephanus omnia pene ad fiscum pertinentia minus caute distribuerat.*

Seld. Id. § 10.

§ 105. In the charters by which king Richard II. created Henry Percy earl of Northumberland, and John Mowbray earl of Nottingham, the following clause is inserted. *Volentes ulterius de gratia nostra speciali quod omnia castra dominia maneria terra et tenementa quæ eidem (Henricus) jure hereditario vel adquisitione propria præante tenuit et possedit, vel imposterum*

Seld. Id. § 10.

est habiturus, sub honore comitate, et tamquam parcella dicti comitatus de cætero teneatur.

§ 106. Where an earldom became vested in the crown by forfeiture or escheat, and the lands belonging to it were granted to another person, the new grantee acquired the dignity of an earl.

§ 107. Thus when the earldom of Leicester came to king Henry III. by the forfeiture of Simon de Montfort, he granted it to his son Edmund by these words: — *Sciatis quod dedimus et concessimus Edmundo filio nostro prædicta comitatum honorem senescalcia terras et tenementa quæ fuerunt præfati Simonis inimici nostri, exceptis dominicis nostris, habendum et tenendum de nobis et hæredibus nostris eidem Edmundo et hæredibus suis imperpetuum, faciendo servitium inde debitum et consuetum.* And Mr. Selden observes, that under the words *comitatus Leicestriæ* the dignity of earl was comprehended. Seld. Id. § 10.

§ 108. Where an earldom consisted of a particular tract of land it was, like a barony*, a feudal lordship or manor, consisting of demesnes and services, and held of the crown, *in capite*. It had also a principal mansion or castle upon it, which was called the *caput comitatus*, and was entitled to the same privileges as the *caput baroniæ*. Were great manors. Bract. 76. a.

§ 109. Where the earldom consisted of the *tertium denarium* of the pleas of the county, the *caput comitatus* was frequently a fortified castle, belonging to the crown, of which the earl possessed himself, as governor of the county. But this being productive of great inconvenience, it was enacted by the statute 13 Richard II. stat. 1. c. 15. that the king's castles and gaols, which were wont to be joined to the bodies of the counties, and were then severed, should be rejoined to the same counties. Spelm. Gloss. p. 142.

§ 110. To these earldoms an extensive jurisdiction, both civil and criminal, was always given. And in the charter of creation of the earldom of Hereford there is an express grant of a civil and criminal jurisdiction, in the following words: Ante.

* The word Barony is sometimes used for the estate of an earl, as in Magna Charta, where *baronia comitis integra* is synonymous with earldom.

Cum soca et sacha toll team et infangeontheof, et cum omnibus consuetudinibus sicut unquam alius comes melius et honorabilius et quietius et liberius et plenarius aliquod tenementum vel dominium de me, in Anglia, vel unquam tenuit de aliquo antecessore meo.

It was the same with the third sort of earldoms, to which a civil and criminal jurisdiction was uniformly annexed.

§ 111. Earldoms were subject to relief as well as baronies. The antient relief of an earldom consisted of arms and horses. But the words of Magna Charta have been already stated, by which it was declared to be then 100*l.*; and where the same person died seised of several earldoms, the heir paid a several relief for each of them.

Id. § 11. § 112. Thus Selden has cited from the Rolls of the Exchequer, 6 Edward III. the following entry, respecting the relief of John de Bohun, earl of Essex and Hereford; his heir being required to answer to the king for the reliefs due upon his father's death: — *Venit per attornatum suum et dat domino regi* CCLI. *libras* II. *solidos* III. *denarios pro relevio præd' Humfredi patris sui, de terris et tenementis prædictis, videlicet* C. *libras pro comitatu Essex.* C. *libras pro comitatu Hereford, &c.*

2 Inst. 9. § 113. Lord Coke says, the heir of an earl or a baron may pay the relief expressed in Magna Charta without having the number of knights' fees originally required to constitute an earldom or barony. "For if upon the creation of any earl the king did grant any manors, lands, or annuity, *per comitatum et nomine comitis*, or *sub nomine et honore comitis*, or the like, he should pay C. *l.* for relief, and so of the baron, *mutatis mutandis.* For a special reservation may derogate from the common law; but otherwise it is if the manors, lands, or annuity be granted unto the earl, *ut idem comes statum et honorem comitis melius manutenere et supportare possit*, or *ad sustinendum* 1 Inst. 83. b. *nomen et honos*, or the like; for then the earl holdeth not *per comitatum*, or *nomine comitis.*"

§ 114. The possessions of an earl, as well as those of a baron, were frequently called honors. Thus the earldom of Richmond was, and is still called the honor of Richmond. The earldom of Arundel was called the honor of Arundel. And when earldoms came unto the hands of the king by for-

feiture or escheat, they were distinguished from the ancient possessions of the crown by the name of *honores comitum.* So where a new earl was created of a forfeited or escheated earldom, the possessions were usually granted to him by the name of *honoris comitatus.* Mad. Exch. c. 10. § 4.

§ 115. It appears from the passage already cited from Spelman, that earldoms as well as baronies were held of the crown by the tenure of grand serjeanty, of which the service was, attendance on the *curia regis* and the *magnum consilium* on the great festivals, and at any other time when summoned. And where a person acquired the possession of an earldom, though for a particular estate, he was liable to the performance of this service as long as his estate lasted, as appears from the following instance. Ante § 35.

§ 116. Gilbert de Clare, earl of Gloucester and Hertford, married Joan d'Acres, daughter to king Edward I., before which the king had seised all his lands, but after the marriage he granted them back to the earl and his wife, and the issue of their bodies. This Gilbert died in 1295, and his widow married Ralph de Monthermer, who, becoming seised in her right of the earldoms of Gloucester and Hertford, was summoned to parliament by the description of *Radus de Monte Hermer comes Glouc' et Hertf'*, during the life of his wife; but on her death the earldoms devolved to her son, who was summoned as earl of Gloucester and Hertford; and Monthermer was summoned as a baron. Brooke's Catalogue. Dugdale's Baronage. Rot. Parl. v. i. 188.

§ 117. It is impossible to ascertain at what period the possession of an earldom ceased to confer a right to be summoned to parliament as an earl. But it appears from our ancient records, that one great honor retained that quality for a considerable time. The dignity of earl annexed to some estates.

§ 118. The castle and honor of Arundel appear to have been granted by king Henry II. to William de Albini, by the name of *castellum de Arundel cum toto honore Arundelli, et cum omnibus pertinentiis suis.* From him it descended, through a female heir, to John Fitzallan, who transmitted it to his grandson Richard Fitzallan. "That this Richard, (says Dugdale), thus possessing the castle of Arundel, thereupon Dugd. Bar. v. i. 119. Selden, id. c. 9. § 5. Dugd. Bar. 315.

enjoyed the honor, *viz.* the title of earl, without any formal creation, is clear enough from sundry authorities. First, from the letters of protection which he had in 26 Edward I. upon that expedition then made into Scotland, wherein he was, he being therein called *Richardus filius Alani, comes Arundell.* Next, by that precept, 29 Edward I., directed to him from the king, whereby, taking notice that he had raised certain forces to march against Foulk Fitz-Warine, a great baron in Shropshire, he is therein also styled *comes Arundell.* As also by the inquisition taken after his death the next year, wherein he is also so called. Moreover that John his ancestor had that title before him, is evident from the king's mandate to the treasurer and barons of the exchequer, in 35 Edward I. to enquire what debts Edmund, then earl of Arundel, son and heir to this last mentioned Richard, stood charged with, either in his own name, or in the name of any of his ancestors, in which mandate there is this expression: *Quod idem Edmundus nobis tenetur ad scacharium prædictum in* CIII. *l.* XVI. *s.* IX. *d. de duobus debitis quæ inveniuntur in rotulis scacharii nostri prædicti, sub nomine Johannis filii Alani, quondam comitis Arundelliæ, antecessoris prædicti Edmundi, &c.*"

Earldom of Arundel. Dugd. Bar. v. i. 321. Vide ante § 5.

§ 119. Upon the death of Thomas Fitzallan, earl of Arundel, in 4 Henry V. without issue, this earldom by reason of an entail of the castle of Arundel, made by Richard earl of Arundel, his grandfather, in 21 Edward III., descended on Sir John Fitzallan, cousin and next heir male to the said Thomas. This John was summoned to parliament in 7 and 8 Henry VI., by the title of John Arundel, *comes Arundel chevalier.* But in 11 Henry VI., being then in France upon the king's service, he exhibited his petition in parliament that he might be accepted to his proper place there, and also in all public councils, as earl of Arundel, by reason that his ancestors, earls of Arundel, lords of the castle, honor and seignory of Arundel, had used to enjoy their place and seat in all parliaments and councils of the king, and his most noble progenitors, time out of mind, as lords of the castle, honor and seignory before expressed, whereunto the title was united and annexed, and which were then in his possession.

Rol. Parl. v. iv. 441.

Upon the reading of this petition, John Mowbray duke of Norfolk, then a minor and in ward to the king, making claim to the same castle, honor and seignory, exhibited also his petition, claiming them as his right.

The earl of Arundel stated his title, that Richard earl of Arundel, his ancestor, being seized of the said castle in his demesne as of fee, was earl of Arundel, by reason of the possession which he had thereof; which Richard being thus seised, by a fine levied in 21 Edward III., entailed it upon the issue male of his own body. That Thomas earl of Arundel, grandson and lineal heir male to the same Richard, was then dead without issue, and by virtue of that entail the castle and seignory of Arundel descended to John earl of Arundel and lord Maltravers, to whom the claimant was son and heir.

§ 120. An act was then passed reciting that the above petitions were read, and maturely considered by the judges and the king's counsel; and it being considered that Richard Fitzallan, cousin and one of the coheirs to Hugh de Albini, some time earl of Arundel, was seized of the same castle, honour, and seignory in his demesne as of fee, and that by reason thereof, without any creation, he was thereupon earl of Arundel, and peaceably enjoyed the name, state, and honour of earl of Arundel, in all parliaments and councils, as long as he lived, without any interruption or restraint. The king, therefore, well weighing the premises, and likewise considering the many services done by this John in his realm of France and duchy of Normandy, desiring to do him all right therein, did, by the advice of the prelates, dukes, earls, and barons, then assembled in parliament, admit him to the place and seat in parliament of earl of Arundel, in the same manner as his ancestors earls of Arundel theretofore had the same; saving the rights of the king and of the duke of Norfolk. Idem, 443. No. 35.

§ 121. It also appears from the rolls of parliament, that a dispute having arisen between William earl of Arundel and the earl of Devon, respecting their precedence in the parliament which was held at Westminster in 24 Henry VI., the king committed it to certain lords of the same parliament to examine and decide; and it not having been then decided, Vol. v. 148.

the king in the parliament held in the 27th year of his reign, directed that the judges should examine the said matters and report thereof; who seeing the premises, with an act exemplified made in the eleventh year of the said king for John late earl of Arundel, brother of the said William, whose heir he was: they declared that it was matter of parliament, belonging to the king, and to the lords spiritual and temporal. Howbeit that the said act made mention only that the said John late earl of Arundel, brother of the said William, whose heir he was, should have his seat, place, and pre-eminence, as earl of Arundel; in which act it was not expressed in writing, the heirs of the same late earl, notwithstanding that he was seised and inherited in the said castle, honor, and seignory of Arundel, whereto the said name, estate, and dignity was, and time that no mind was, had been united and annexed; and by that reason he bore and held that name, and not by way of creation, as the same judges understood by the same act. And that it belonged to be discussed and determined by the king and his lords, and not otherwise.

Ante § 118.

Whereupon the king determined and decreed that William then earl of Arundel, should have, keep, and enjoy his seat, place, and pre-eminence in the high court of parliament, and elsewhere, as worshipfully as ever did any of his ancestors earls of Arundel afore that time, for him and his heirs for evermore, above the said earl of Devon and his heirs.

§ 122. The castle and honor of Arundel descended to Henry Fitzallan earl of Arundel, who settled the same on his grandson, Philip Howard, the eldest son of Thomas duke of Norfolk, who was attainted of high treason, and beheaded in 1572. This Philip Howard was summoned to parliament as earl of Arundel in 23 Elizabeth, and appears from the journals to have sat in the place of the ancient earls of Arundel.

§ 123. That he was summoned by reason of the possession of the castle and honor of Arundel appears from the following passage in Vincent's notes on Raphe Brooke's Catalogue of Nobility: "And can master Yorke have any fuller satisfaction touching that act (11 Henry VI.) than the pursuit thereof in practice which hath since followed, whereof himself

Title Sussex, p. 566.

Ante § 118.

in his memorie hath or might have seen an instance in the person of earl Philip, heir to Mary, second daughter and coheir of Henry Fitz Allan, earl of Arundel, his mother, wife to Thomas duke of Norfolk, unto whom was conveyed the said castle of Arundel; in right whereof he did assume the title of earl of Arundel (as Raphe confesseth in his first edition, though in his last he hath maliciously contradicted it), which being at the first stood upon, in respect of the late attainder of his father, and the bad and cloudy aspect of the times, he, notwithstanding, approved of his right thereunto before the lord treasurer Burleigh and other lords of her late majestie's council, by the seisin and possession of that castle, so descended to him (as may be testified by some honourable persons then present and yet living), and was therefore accordingly received into the place and title of earl of Arundel, and so sate in parliament almost two months before his restoration in blood, as Raphe himself hath cited out of the journal book of parliament."

§ 124. In 3 Charles I. Thomas earl of Arundel obtained a private act for annexing the castle and honor of Arundel to the title, name, and dignity of earl of Arundel, and for entailing the same; of which the preamble shall be here transcribed. "In all humble wise sheweth unto your most excellent majesty, Thomas earl of Arundel and Surrey, earl marshall of England, lord Fitzallan Clun Oswaldestre and Maltravers, that whereas the title, name, and dignitie of earl of Arundel is and from the time whereof the memory of man is not to the contrary, hath been reall and locall, and hath from the time aforesaid, belonged unto and been used and enjoyed by himself and such of the ancestors of the late earl of Arundel as have had in them and enjoyed the inheritance of the castle, honour, and lordship of Arundel in the county of Sussex; and by reason of the inheritance and seisin of the said castle, honour, and lordship, the said earl and his said ancestors from the time whereof the memory of man is not to the contrary, have been earls of Arundel, and have thereby had, used, and borne and enjoyed the title, name, and dignity of earl of Arundel, and thereby alsoe have, from the time

Vide infra, c. iv.

aforesaid, had and enjoyed their places in your majestie's parliaments and councils and elsewhere as earls of Arundel," &c.

Dukedoms by tenure. Seld. id. § 29.

§ 125. The dignity of duke was also originally annexed to the possession of lands. For when king Edward III. created the Black Prince duke of Cornwall, he gave him a charter, by which he granted to him the name and honor of duke of Cornwall, the office of sheriff, with the power of nominating all future sheriffs, together with several manors and franchises in Cornwall, which Selden says were erected into a duchy.

Idem.

§ 126. The operative words of this charter are: *Eidem filio nostro nomen et honorem ducis Cornubiæ de communi assensu et concilio prælatorum, comitum, baronum, &c. dedimus. Ipsumque in ducem Cornubiæ præfecimus et gladio cinximus sicut decet. Et ne in dubium verti poterit aliqualiter in futurum quid aut quantum idem dux seu alii duces dicti loci qui pro tempore fuerint, nomine ducatus prædicti habere debeant, omnia in specie quæ ad ipsum ducatum pertinere volumus, hac carta nostra duximus inserenda. Dedimus itaque et concessimus pro nobis, &c. eidem filio nostro sub nomine et honore ducis dicti loci, castra, maneria, terras et tenementa, et alia subscripta, &c. habendum et tenendum eidem duci et ipsius et hæredum suorum regum Angliæ filiis primogenitis et dicti loci ducibus in regno Angliæ hæreditariè successuris, &c.*

Idem.

§ 127. Selden states that king Edward III. created Henry earl of Lancaster duke of Lancaster for life in parliament; and the clause of investiture in the charter was only — *Nomen ducis Lancastriæ imponimus, et ipsum de nomine ducis dicti loci, per cincturam gladii præsentialiter investimus.* And the county of Lancaster as a county palatine, with reference to that of Chester for example of jurisdiction, was given to him as the body of his duchy.

4 Inst. 36.

§ 128. Upon the death of Henry duke of Lancaster, king Edward III. conferred the duchy upon his son John for life, with royal jurisdiction, which is created in the following words:

Concessimus pro nobis et hæredibus nostris præfato filio nostro,

quod ipse ad totam vitam suam habeat infra comitatum Lancastriæ cancellariam suam, ac brevia sua, sub sigillo suo, pro officio cancellarii, deputando consignando justiciarios suos, tam ad placita coronæ, quam ad quæcunque alia placita communem legem tangentia, tenenda, ac cognitiones eorundem ad quascunque executiones per brevia sua et ministros suos faciendas. Et quæcunque alia libertates et jura regalia ad comitatum palatinum pertinentia adeo liberè et integrè sicut comes Cestriæ infra eundem comitatum Cestriæ dignoscitur obtinere, &c.

§ 129. These are the only dukedoms by tenure that were ever created in England, and both of them still exist. That of Lancaster in the hands of the crown, and that of Cornwall in those of the prince of Wales, whenever there is one; it being so limited as always to vest in the eldest son, for the time being, of the king; and as soon as such eldest son acquires the possession of the duchy, he becomes duke of Cornwall without any creation.

8 Rep. 1. Collins, 148.

§ 130. Mr. Madox has observed, that as without knight service tenure by barony could not subsist, it might therefore be said, that by taking away tenure by knight service, which was done by the statute 12 Charles II. c. 24., barony was virtually taken away. But if baronies be held by grand serjeanty, this observation is not well founded; for the honorary services incident to that tenure are not only preserved by that act, but there is also an express proviso in it (§ 11.) for the preservation of feudal dignities, by which it is declared that nothing in the act "shall infringe or hurt any title of honor, feudal or other, by which any person had or might have a right to sit in the lord's house of parliament, as to his or their title of honor, or sitting in parliament, and the privileges belonging to them as peers."

Dignities by tenure saved in the stat. 12 Cha. II.

§ 131. In the case of the barony of Fitzwalter, which was heard before the privy council in 1669, assisted by the two chief justices, sir John Keeling and sir John Vaughan, the chief baron sir Mathew Hale, and the chief serjeant, the attorney and solicitor general, the counsel for one of the claimants affirmed that the same was a barony by tenure, and ought to go along with the land, which was denied by the counsel on

Collins, 287.

the other side, who offered to argue upon the same.—"Upon which both parties being ordered to withdraw, and the nature of a barony by tenure being discussed, it was found to have been discontinued for many ages, and not in being, and so not fit to be revived, or to admit any pretence or right of succession thereupon. And the pretence of a barony by tenure being declared, for weighty reasons, not to be insisted on, the counsel were called in, &c."

CHAPTER III.

DIGNITIES BY CHARTER, WRIT, LETTERS PATENT, AND MARRIAGE.

§ 1. *Dignities by Charter.*
5. *Investiture.*
8. *Dignities by Writ.*
14. *Form of a Writ of Summons.*
21. *The Person summoned must sit.*
25. *Dignities by Writ are Hereditary.*
48. *Writs to the Eldest Sons of Peers.*
58. *Dignities by Letters Patent.*
66. *Investiture.*
§ 69. *Creation Money.*
72. *A Sitting not necessary.*
76. *There must be words of Limitation.*
78. *Restitution by Letters Patent.*
80. *Dignities by Marriage.*
88. *On whom Dignities may be conferred.*
89. *On Peers of Scotland.*
95. *Whether a Dignity can be refused.*

SECTION I.

Dignities by charter.

It has been stated that dignities were originally created by charter, containing a grant of the estate to which the dignity was annexed *; and the charters by which the empress Maud created Ganfridus *de magna villa* earl of Essex, and Milo de Gloucester earl of Hereford, as also that by which king Henry II. created Aubrey de Vere earl of Oxford, have been already inserted. But dignities, as personal honors, were also, in ancient times, created by royal charter. Ch. ii.

§ 2. Thus we find, among the rolls of parliament, that in 36 Edward III. the chancellor declared to parliament the king's intention to honor such of his sons as were of full age. That his son Lionel, who was then in Ireland, should be duke of Clarence; his son John, duke of Lancaster; and his son Edmund, earl of Cambridge. In this instance the dignities of Clarence and Cambridge were mere personal honors, that Vol. ii. 273. No. 36.

* Earls are said to have been sometimes created by mere nomination, and girding the person named with a sword; but it is probable, that in all those cases there was also a charter.

of Lancaster was territorial, and annexed to the possession of Lancashire. And it is said in the roll, that the king gave to the new earl of Cambridge a charter.

Rot. Parl. vol. iii. 250. No. 44.

§ 3. In 11 Richard II. the commons petitioned the king to confer some honor on his brother, Sir John Holland; in consequence of which he, with the consent of parliament, created him earl of Huntingdon, by a charter which is inserted in the rolls of parliament, of which the following are the operative words. *Prefatum Johannem fratrem nostrum in comitem Hunt' ereximus ipsumque in comitem com' prædicti cum titulo stilo ac nomine et honore eidem debitis tenore presentium preficimus et creamus, ac inde presentialiter investimus, et gladio cinximus prout decet, habend' et tenend' titulum et stilum ac nomen et honorem prædicta eidem Johanni et heredibus masculis de corpore suo et corpore Elizabeth' uxoris sue legitime procreatis imperpetuum.*

Vide Id. 264.

Id. 343.

§ 4. In 20 Richard II. the chancellor informed the parliament that the king had created his cousin John de Beauford earl of Somerset, and the charter is entered in the rolls of parliament. In the next year there is in the same rolls an account of the creation of several dukes by charter. The countess of Norfolk was at the same time created a duchess for life; and she being absent, her charter was sent to her.

Id. 355.

Investiture.

Seld. id. § 10.

§ 5. In most of the ancient charters there is a clause of investiture, conformable to the practice of the feudal law, which is generally in these words. *Ipsumque N. hujusmodi statu stilo titulo honore et dignitate per cincturam gladii insignimus investimus et realiter nobilitamus, et unam capam honoris et dignitatis, atque circulum aureum super caput suum ponimus.*

Ante, § 2.

§ 6. In the creation of the dukedoms of Lancaster and Clarence, it is said in the rolls that the king did gird his son John with a sword, and set on his head a cap of fur, and upon the same a circlet of pearls and gold, and named him duke of Lancaster; and that, in like manner, the king girded his son Edmund with a sword, and named him earl of Cambridge.

Id. § 10.

§ 7. Selden says, if the person created were of a greater dignity before his creation, then his title was given him without any clause of ceremonial investiture; and so it seemed

without any actual investiture, as in that of king Henry VI. to John duke of Somerset, made earl of Kendal. He only grants him *nomen stilum titulum et honorem comitis de Kendal, ultra nomen ducis Somerset.*

§ 8. It was always the practice, whenever our monarchs were desirous of convening a *magnum consilium*, to call for the attendance of their nobles by writs of summons, addressed personally to each of them. In consequence of an article in the *Magna Charta* of king John, which has been already stated, particular writs were to be sent only to the *majores barones.* And after the law mentioned by Camden, that none but the great barons, and such others as were summoned by particular writs, should come to parliament, our best antiquaries agree that the crown acquired, or assumed, the prerogative of sending writs of summons to persons who were not possessed of baronies, by which they were seated among the peers. Dignities by writ. Ch. i. Id. § 44.

§ 9. This mode of creating dignities is supposed to have been first adopted by king Henry III. For, in consequence of the barons' wars, which took place in that reign, a great number of the ancient nobility were destroyed; and to make up that deficiency, when a parliament was summoned, after the death of Montford earl of Leicester, the king sent writs of summons to several persons, not possessed of land baronies, who thereby became barons, and peers of parliament. Dugd. Pref. to Summ. Collins, 118.

§ 10. There is no list of the persons summoned to the last parliament held by king Henry III. in which this innovation is supposed to have been practised; though the list of the persons summoned to the parliament held by Montford in the same year, namely, 49 Henry III., is still extant, and has been published by Dugdale.

§ 11. Selden observes, that in consequence of the practice of summoning persons to parliament who did not hold *per baroniam*, barons became divided into two sorts, — barons by writ and tenure, and barons by writ only. Barons by writ and tenure were such as having the possession of ancient baronies, were called by several writs to parliament, according to that clause in *Magna Charta* which relates to the Id. § 22.

barones majores. Barons by writ only were such as were called by the like writ of summons, although they had no possessions that were honorary baronies, or where barons by tenure had aliened their possessions, retaining their ancient place and dignity, they became, in consequence of such alienation, barons by writ only.

§ 12. A dignity by writ is therefore where the crown issues a writ of summons to a person who is not a peer, or tenant *per baroniam*, requiring him to come and attend parliament on a particular day, there to consult with the peers of the realm on certain matters relating to the state.

§ 13. This has been called a writ of personal summons, in order to distinguish it from those writs which were issued to persons possessed of land baronies; and it seems to have been held, in the case of the barony of Roos, that unless a writ of this kind contains something by which it can be connected with a land barony, it will be deemed a writ of personal summons.

Ch. ii. § 82.

Form of a Writ of Summons. Hales's Jurisd. of Lords, c. ii. Collins, 203.

§ 14. The form of a writ of summons to parliament is thus: *Rex, &c. dilecto et fideli nostro N. quia super quibusdam arduis negotiis, nos et regnum nostrum cæterosque proceres et magnates de eodem regno tangentibus quæ sine vestra et eorum præsentia nolumus expediri, parliamentum nostrum tenere, et vobiscum super hiis colloquium habere volumus et tractatum; vobis mandamus in fide et homagio quibus nobis tenemini, firmiter injungentes quod sitis ad nos apud Westmonasterium primo die mensis Augusti proximi futuro, vel saltem infra terminum diei subsequentis ad ultimum, nobiscum super dictis negotiis tractaturi, et vestrum consilium impensuri; et hoc nullo modo omittatis. Teste me ipso, &c.*

Pettus on Parliaments.

§ 15. Writs of summons to parliament are of that species usually called *brevia clausa*, because they are closed up with yellow wax, and sealed with the great seal of England; they are then sent with labels to every individual peer.

Id. § 22.

§ 16. Selden observes, that the writs of summons differed according to the quality of the persons to whom they were addressed. The spiritual barons were commanded to be present, *in fide et dilectione quibus nobis tenemini*, as in that of

king Henry III.; and the temporal, *in fide et homagio*, till about the middle of the reign of king Edward III., when the words, *in fide et ligeantia* began to be used instead of them; yet so that the word *homagio* was afterwards also, in the same place, sometimes inserted.

§ 17. The writs that were addressed to those persons who had place in parliament, but no voice, as the judges, the attorney-general, and the king's serjeants, commanded them, *ut intersitis nobiscum et cum cæteris de consilio nostro;* and sometimes, *nobiscum* only, *super præmissis tractaturi, vestrumque consilium impensuri:* whereas that of the barons was, *quod intersitis cum prælatibus magnatibus et proceribus, &c.;* a difference which still continues. Hale's Jurisd. 11.

§ 18. In these writs the temporal barons are usually stiled by their christian and surnames, or by their baronies in lieu of their surnames. In the old writs, the barons of Greystock and Stafford have frequently the addition of baron. And in modern times, all barons are stiled *chevalier*.

§ 19. Lord Hale has observed that the title *dominus*, in the writs to the lords, was in ancient times very rare; but they were directed *Willelmo de Grey, chevalier;* and so in other writs at common law; and the reason, as given by the old books, was, because the king writes to none of his subjects by the name of lord. But in the time of king Henry VI. this was altered in many cases, for divers of the nobility are summoned by the name of *dominus;* as *dominus de Say, dominus de Ferrars*. Jurisd. of the Lords, 13.

§ 20. In almost all the ancient writs of summons, the title is the surname of the person summoned, but in process of time some of those additions which were first used to distinguish the person summoned from some other of the same surname, were, by corruption, introduced as the true title. And where the title was not the surname of the party, but some other name, either that of an ancient family from which the party was descended, through heirs female; or of some place of note, from which the title was taken, the practice was to omit the surname of the party, in the direction of the writ. Collins, 326.

The person summoned must sit.

§ 21. A writ of summons has not the effect of conferring a dignity on the person summoned, till he has actually taken his seat in parliament, by virtue of such writ; so that where a person was summoned to parliament, by such a writ, and died before the parliament sat, it was resolved that he was not a peer.

Lord Abergavenny's Case, 12 Rep. 70. 1 Inst. 16. b

§ 22. A question arose in the parliament held in 8 James I., whether Edward Nevill, who was called by writ to parliament in 2 and 3 Mary, and died before the parliament met, was a baron or not. It was resolved by the lord chancellor, the two chief justices, and divers other justices there present: "That the direction and delivery of the writ did not make "him a baron or noble, until he came to parliament, and "there sat, according to the commandment of the writ; for "until that, the writ did not take effect. And in the "35 Henry VI., 46, and other books, he is called a peer of "parliament, the which he cannot be until he sit in par- "liament, and he cannot be of the parliament until the "parliament begin. And forasmuch as he hath been made "a peer of parliament by writ (by which impliedly he is a "baron), the writ hath no operation and effect until he sit "in parliament, there to consult with the king and the "other nobles of the realm; which command of the king "by his *supersedeas* may be countermanded. Or the said "Edward Nevill might have excused himself to the king; "or he might have waived it, and submitted himself to his "fine, as one who is distrained to be a knight, or one learned "in the law is called to be a serjeant. And when one is "called by writ to parliament, the order is that he be ap- "parelled in his parliament robes, and his writ is openly read "in the upper house, and he is brought into his place by "two lords of parliament, and then he is adjudged in law "*inter pares regni*."

§ 23. A person called to parliament by writ may take his seat by proxy; at least Camden mentions a case of this kind.

Camden's Ann. anno 1597.

Lord Thomas Howard, second son of the duke of Norfolk, was called to parliament by writ in 34 Elizabeth; but being

unable to attend on account of sickness, lord Scroop was introduced into the house of lords as his proxy or representative, between two barons, and was seated for him.

§ 24. With respect to the proofs required of a sitting in parliament by virtue of a writ of summons, they will be stated in a subsequent chapter. Ch. vi.

§ 25. Although writs of summons to parliament, whether addressed to persons never summoned before, or to ancient barons, or their descendants; for in both cases the writs have in general been exactly similar; do not contain any words of inheritance; except in one instance, which will be mentioned hereafter, yet it appears to have been long settled, that where a person was summoned to parliament by the usual writ, and took his seat in the house of peers, under such writ, he acquired the dignity of a baron, not only for himself, but also for all his lineal descendants, both male and female. Dignities by Writ are hereditary.

This doctrine has, however, been controverted by Mr. Prynne in his plea for the lords, and his register of parliamentary writs; by Mr. Elsynge in his manner of holding parliaments; and by Mr. West in his enquiry into the manner of creating peers. The substance of their arguments may be thus reduced.

§ 26. 1°. That in the writs of summons to parliament neither the words baron, barony, or heirs are to be found. And as the king cannot, by his letters patent, create any person a baron or peer, in fee or in tail, without express words of creation and limitation in the patent, for that purpose; and as in all the patents that passed from 20 Hen. VIII. there was, not only a special clause inserted for creating the patentees barons, but also for enabling them and their heirs, or the heirs of their bodies, to hold and possess a seat and place in parliament; it seemed equally necessary, that special words of limitation should be inserted in writs of summons to persons who were not at the time peers of parliament. Infra.

§ 27. 2°. It was a known rule of law that the king's grants could not enure to two intents, especially where one of them was clearly expressed, and the other not. Now if a writ of

summons did create any person a baron or peer, it operated by way of grant, which must be by the implication of an intent, not only not expressed, but perfectly foreign to that which was, and therefore at least in every thing but a writ of summons, could be in law only intended. For the intention of the king, clearly expressed in the writ, was not to create the person summoned a baron, but only to consult and treat with him concerning the affairs of the nation, which certainly might be done without his being a baron.

§ 28. 3°. If a writ of summons alone ennobled a person to whom it was addressed, and his descendants, then were all the judges, the king's serjeants at law, the masters in chancery, and several other persons ennobled; for they received writs of summons, nearly similar at one time, and exactly similar at another, to those that were issued to the earls and barons, and attended parliament in pursuance of those writs, yet they never claimed to be peers.

§ 29. 4°. It appeared from the lists of the ancient writs of summons, that during the reigns of the first three Edwards, some persons received writs of summons to parliament only once, some twice, and some during their lives, but none were sent to their descendants.

§ 30. There is certainly sufficient grounds here stated for concluding that a mere sitting in parliament, under a writ of summons, was not in early times sufficient to create an hereditary dignity, but that some additional act was necessary, and this conclusion is supported by the following passages in Dugdale's Baronage.

Vol. ii. James Fiennes, in 25 Henry VI., by reason that Joan, his mother, was third sister and coheir to William de Say, a descendant of the former barons Say, by a special writ, bearing date at St. Edmundsbury, 3 *Martii*, had summons to that parliament then held there, by the title of lord Say and Sele; whereupon the third day after, in consideration of his eminent services performed, as well beyond the seas, as in this realm of England, he was, in open parliament, there by the assent of the lords spiritual and temporal, advanced to the

degree and dignity of a baron of this realm, by the same title of lord Say and Sele; and to the heirs of his body.*

William Paget, upon the 3d December, 4 Edward VI., was called by writ to the parliament then sitting, by the name of lord Paget, of Beaudsert, in com. Staff., and took his place there amongst the peers; after which, upon the 19th of January next ensuing he had his solemn creation to that honor.† Id. Pa.

§ 31. It does not, however, appear from these passages, what the form of this solemn creation to the honor was. Mr. Elsynge thought that investiture with robes was necessary to ennoble a person summoned by writ, so as to render his dignity hereditary; and this is strongly confirmed by the language of the judges in lord Abergavenny's case, who says, "and where one is called by writ to parliament, the order is that he be apparelled in his parliamentary robes, and his writ is openly read in the upper house, and he is brought into his place by two lords of parliament, and then he is adjudged in law, *inter pares regni*." 12 Rys. 70.

§ 32. An ancient manuscript in the Harleian Collection, No. 5127, entitled, "Of Honorary Titles in England," contains the following account of the creation of a baron by writ. "The way of making a baron by writ is after this manner. First, he is brought by garter king at arms, in his surcoat, to the lord chancellor, between two of the youngest barons, who beare the robe of a baron. Then he shews his writ of prescript, which the chancellor reads, then congratulates him as a baron, and invests him with those robes, and sends him back to his place; then is the writ delivered to the clerk of parliament, and he, by garter, shewed to the barons, is placed in the house of peers; and from thence is the title of a baron allowed him as hereditary."

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* I have examined the roll of this parliament, and found nothing in it respecting this creation.

† Nothing of this, however, appears on the journals. The entry on the 3d December, is Willielmus Paget, miles, &c. *acursitus per breve regium ad parliamentum, nomine domini Paget de Beaudesert, hodie admissus est inter proceres, et locatus inter barones regni.* Journals, vol. i. 365.

§ 33. It must be supposed that this writ of prescript, as it is called, was not the usual writ of summons, but an additional warrant from the crown, addressed to the lord chancellor, and commanding him to invest the person summoned with the robes of a baron, for otherwise every person summoned by writ would have been equally entitled to investiture with robes; whereas it is quite certain this could not have been so, for the descendants of a great many persons who had been summoned by the usual writ, and had sat in parliament, were never summoned.

§ 34. If the preceding authorities be admitted, it will follow that formerly a barony by writ was a personal dignity, unconnected with any particular castle, manor, or estate in land; which was created by a writ of summons, and a solemn investiture with robes, of the person so summoned, in full parliament.

§ 35. It is not known at what time the practice of investiture with robes ceased: but it appears to have been fully settled and admitted when lord Coke wrote that a writ of summons to parliament, and a sitting in pursuance thereof, as a peer, except in the case of a spiritual person, operated as a creation of a barony, descendible to the lineal heirs, or heirs of the body, both male and female, of the person so summoned; and this doctrine has been confirmed by so many decisions, that it is not to be now shaken.

1 Inst. 9. b. 16. b.

§ 36. Thus, in the case of lord Abergavenny, it appears to have been admitted by the lord chancellor, and the judges who attended on that occasion, that if Edward Nevill had taken his seat under the writ of summons, he would have acquired a barony, descendible to all his lineal heirs. But this point was more fully discussed, and distinctly settled in the case of the barony of Clifton in the year 1673, and in that of the barony of Willoughby de Broke in 1694, which will be stated in a subsequent chapter.

Ante, § 22.

§ 37. The mode of descent may, however, be restrained by the writ of summons to heirs male only. Thus Dugdale has given an instance of a writ of summons issued in 27 Henry VI. to Henry Bromflete, in which the following clause is inserted,

Summ. 441.

volumus enim vos et hæredes vestros masculos, de corpore vestro exeuntes, barones de Vesey existere. But there appears no other instance of this kind.

§ 38. It was resolved by the house of lords, in the following case, that a single writ of summons issued to a person in the reign of king Edward I. without any proof of a sitting under it, did not create an hereditary barony.

§ 39. In 1677, John lord Frescheville presented a petition to the king, stating that he, as lineal heir male of Raphe de Frescheville of Stavely, who had summons to parliament amongst the barons of the realm, in the 25th year of king Edward I. had been advanced to the title and dignity of a baron of the realm, by letters patent, dated 16th March, 16 Charles II.

That upon a solemn debate in the house of peers, in the case of the lady Catherine O'Brien, lineal heir to Gervase lord Clifton, it was resolved that the said Gervase Clifton, being summoned to parliament by a special writ, and sitting in parliament accordingly, was a peer and baron of the realm, and his blood thereby ennobled. The petitioner therefore conceiving, that by the same reason the blood of his lineal ancestor, by that summons and sitting in parliament, in the time of king Edward I.; being then ennobled, and there never having been any attainder in his family which might legally interrupt his claim to the honor of his said ancestor: so that he had a just right and title thereunto. He therefore claimed the same place and precedence as his said ancestor anciently had and enjoyed. Infra, c. v.

This petition was referred to the attorney general, sir William Jones, who made the following report on it.

" I have examined the contents of this petition, and do find by a copy of the record, attested by the keeper of your majesty's records within the tower, that Raphe de Frescheville was among the barons summoned by writ to the parliament held in 25 Edward I. It also appears unto me by several pedigrees of credit and antiquity that the now lord Frescheville is lineally descended as heir, both general and male from the said Raphe de Frescheville; but it doth not appear by any evidence that the said Raphe or any of his descendants (till

your majesty's creation of the now lord Frescheville) were ever summoned or sat in parliament, after the said parliament of 25 Edward I. And therefore my humble opinion to your majesty is that you would be graciously pleased to refer the consideration of this petition to the peers now in parliament assembled."

The petition was accordingly referred to the house of lords; where sir W. Jones was heard against the claim on behalf of the crown. He said, that, supposing a summons to parliament by writ did give an estate of inheritance, yet this must be understood when there had been a sitting upon it. Here the not repeating the summons was an evidence of not sitting. It had been objected that there was no evidence of any sitting till the time of Henry VIII., when journals first began. But it was one thing, where writs of summons had been often repeated, another where they never issued but once.

If a man sued by the name of a lord, and the defendant denied him to be a lord, this must be tried by the records of parliament. What, by the writs of summons? No, but by his sitting. The register, 287 had the form of certifying for a lord of parliament. *Quia præfatus A. B. unus baronum ad parliamentum nostrum venientium ex summonitione regia, &c.* But the truth was that anciently a writ of summons and sitting upon it did not make a baron in fee. Anciently there were barons by tenure, but it would be hard to show they were always the same. Among the spiritualty it was plain, sometimes one abbot was called, and afterwards omitted; sometimes a dean: but no such thing could be now. So likewise among the temporalty. It was a strong proof that anciently a writ of summons did not create a fee simple, nor give a right of inheritance; for then they could not be refused to be repeated, as they often were. Dugdale's Baronage had many instances of lords once called, and then left out. And it was familiar with king Edward I. to omit the sons if they were not answerable to their parents.*

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* I am indebted for this note of sir William Jones's argument, which is taken from lord chancellor Nottingham's manuscripts, to the kindness and liberality of the late Francis Hargrave, esq.

The following entry appears in the journals: "The house this day heard his majesty's attorney general, to argue on his majesty's behalf, concerning the petition of John lord Frescheville to his majesty, praying that he, being heir male to Ralph Freschville of Stavely, who had summons to parliament in 25 Edward I., might be admitted to the same place and precedency in parliament as his said ancestor had. The house, upon full and mature consideration, gave his majesty an account thereof as follows: That the lords spiritual and temporal in parliament assembled have examined the matter referred by his majesty to this house upon the petition of the lord Frescheville's claiming a higher place in parliament, as heir male and general to Ralph Freschville of Stavely, summoned to parliament in 25 Edward I., and do not find sufficient ground to advise his majesty to allow the claim of the petitioner." Vol. xiii. 174.

§ 40. Sir W. Blackstone says, some were of opinion that there must be at least two writs of summons, and a sitting in two distinct parliaments, to evidence an hereditary barony; but this is a mistake, for in the case of the barony of Clifton, there was but one writ, and a sitting under it, which was held sufficient to create a barony. 1 Comm. 400. Whitlock of Parlia. c. 110. Collins, 330. Infra, c. v.

§ 41. The irregularities mentioned by Prynne and West, in the summoning peers to parliament arose, partly from the circumstance that many persons were summoned to parliament by writ, without being invested with robes, and so not created hereditary peers, and partly from several other causes.

§ 42. Thus Mr. Elsynge mentions that in 10 Edward III. thirteen barons were omitted, because they were in Scotland, or beyond the seas. That in 46 Edward III. and in divers years of king Henry V. few earls and barons were summoned, the king being then making war in France, and such omissions were thought to be no disparagement to their honor.

§ 43. It has been already stated from Dugdale, that while baronies were by tenure the husbands of women, seised of such baronies, were entitled to writs of summons for, and liable to perform the services annexed to such baronies; but he observes that such writs of summons did not ennoble their descendants. Preface to Summons.

§ 44. Writs of summons might also have been omitted, where the person formerly summoned, or his descendants, had not a sufficient estate to support the dignity. Thus we read in Dugdale, that William, the second lord Say and Sele grew necessitated to mortgage the greater part of his lands, so that afterwards the barony became extinct.

Baronage, vol. ii. 246.

§ 45. It is said in lord Shrewsbury's case, that if a nobleman want possessions to maintain his estate, he cannot press the king in justice to grant him a writ to call him to parliament; and that it was so resolved in the case of lord Ogle, in the reign of king Edward VI., as the baron Burghleigh, lord treasurer of England, at the parliament, anno 25 Elizabeth, did report.

12 Rys. 107.

§ 46. It should also be observed that attendance on parliament was at that time considered as a burthensome service, from which many might solicit to be relieved. Thus Dugdale mentions that John Delaware had summons to parliament from 44 Edward III. to 22 Richard II., and then obtained a special dispensation to be exempt from coming to any future parliaments; and that James Delaware in 3 Henry IV., procured a special dispensation from attending the king in any of his future parliaments, for the space of three years.

Baronage, vol. ii. 17.

§ 47. Thomas de Bromflete, who had been summoned to parliament in 27 Henry VI., obtained, in the thirty-sixth year of that reign, in consideration of his eminent services in the wars of France and Normandy, and that he never had any pay or reward for the same, and was then grown aged and infirm, a special dispensation from coming thenceforth to parliament.

Bankes, vol. ii. 62.

Lord Coke, however, held that these dispensations were contrary to law.

4 Inst. 49.

§ 48. It has been a very ancient practice to call up the eldest sons of earls to the house of lords by writ of summons, by the name or title of some barony vested in their fathers; in all which cases they have been allowed to take their place in parliament, according to the antiquity of the barony, by the name of which they were summoned. And Dugdale, in the preface to his summons to Parliament, after mentioning this

Writs to the eldest sons of peers.

practice, says, "Which usage still continueth, though it be merely of curtesy to the son, in regard the real honor is still in the father; for should the son commit treason, no forfeiture would accrue to the father, nor to his lawful issue, not attainted."

§ 49. The first person who appears to have been summoned to parliament in this manner, was Thomas Arundel, lord Maltravers, son to Richard Fitzallan, earl of Arundel, in 22 Edward IV. Dugd. Summons.

§ 50. In the year 1620, Henry Montague, ancestor to the dukes of Manchester, was created baron Kimbolton and viscount Mandeville, by letters patent. In 1626, he was raised to the dignity of duke of Manchester; in the same year his eldest son was called up to the house of peers by the title of lord Kimbolton; and lord Clarendon observes, that this was a very extraordinary favor. Journ. v. iii. p. 648.

§ 51. In 19 Cha. I. Henry Howard, eldest son of Thomas, earl of Arundel, was called up to the house of lords by writ, by the title of lord Mowbray, which was considered to be the most ancient barony of the Howard family; and he was placed first upon the barons' bench. Id. vol. iv. p. 55.

§ 52. In 29 Cha. II. the lord chancellor acquainted the house, that his majesty had been pleased to issue out a writ of summons to the lord Henry, eldest son to the duke of Norfolk, to attend on that parliament, by the name and title of Henry Mowbray; and there being question whether he should sit in and enjoy the ancient place of the lord Mowbray, the journal book of the house of peers was produced, wherein it did appear, that on the 16th April, 1640, Henry, lord Mowbray, was introduced and placed at the upper end of the barons' bench. Many precedents also of the like nature were urged, and after a full consideration thereof, the house ordered, that the said lord Mowbray should be called in and introduced, and placed in the place of his grandfather, as lord Mowbray, at the upper end of the barons' bench; which was done accordingly. Id. v. xiii. p. 130. Vide Barony of Sidney, infra, c. v.

§ 53. The eldest sons of barons have been very seldom called up to the house of lords, by writ of summons, there

West, 52. being but two instances of it, in both which the fathers had in them several baronies. The first was William Parker, the eldest son of Edward, lord Morley, in 1 Ja. I., by the title of lord Monteagle; and in Dugdale's list of summons he is placed between the lords Darcie de Darcie, and Sandys de Vyne. The second was Coniers Darcie, eldest son of the lord Darcie, in 32 Cha. 2., and who was upon his first summons placed as junior baron; but in the parliament of 1 Ja. 2., that error is amended, for he is there entered between the lords Stourton and Cromwell.

§ 54. In 7 Edw. VI. John lord Dudley, eldest son of the duke of Northumberland, was summoned to parliament by his father's title of earl of Warwick; but this is the only instance I have met with where an earldom has been created by writ.

§ 55. In all the subsequent cases where the eldest son of an earl or other peer of higher rank, has been called to parliament by writ of summons, by a title then vested in his father, he has had the precedence of the barony; but where the eldest son of an earl is called to parliament by writ, by the name of a dignity not then vested in his father, such writ appears to have been considered as a creation of a new barony; for the person so summoned has taken his place as junior baron.

Journ. vol. xiii. 548. § 56. Thus in 31 Cha. 2. John Manners, eldest son of the earl of Rutland, was summoned to parliament by writ, by the description of John Manners of Haddon, chevalier; and there being no barony of Haddon then vested in his father, he took his seat as junior baron.

§ 57. It is highly probable that when writs of summons were first addressed to the eldest sons of earls, the person summoned was not invested with robes, and consequently only acquired the barony for that parliament, or at most during his life; but it has been held in modern times that writs of summons to the eldest sons of peers, whether by the name of a dignity then vested in their fathers or not, create an hereditary dignity in them; provided they take their seat in parliament under such writs.

Barony of Clifford of Launsburg infra, c. v.

§ 58. In the time of king Richard II., who ascended the throne in 1377, it became a practice to create dignities by letters patent under the great seal; which only differ from charters in the mode of attestation. The first instance of a creation of this kind is said to have been in the eleventh year of that prince's reign, when John Beauchamp de Holt was created lord Beauchamp of Kidderminster, by letters patent. "Before whom (says lord Coke) there was never any baron created by letters patent, but by writ." Dignities by letters patent. Seld. id. § 28. 1 Inst. 16. b.

§ 59. Selden has given us the words of creation in these letters patent, which are: *Ipsum Johannem in unum parium et baronum regni nostri Angliæ præficimus. Volentes quod idem Johannes et hæredes masculi de corpore suo exeuntes statum baronis obtineant, ac domini de Beauchamp, et baronis de Kidderminster nuncupantur.* Seld. id. § 28.

§ 60. This John de Beauchamp never sat in parliament as a baron, though his name is upon the summons to parliament, in the year of his creation; for in that very parliament he was attainted, as one of the accomplices of the earl of Suffolk. Besides which, when his patent passed, Michael de la Pole had the keeping of the great seal; and for that reason, it never could have been allowed. For in the parliament held in the preceding year, the great seal had been taken away from De la Pole, and he was declared incapable of ever having it again. West, 58.

§ 61. The second baron created by letters patent was Sir John Cornwall, in 10 Hen. 6., in which the operative words are: *Præfatum Johannem in baronem indigenam regni sui Angliæ erexit prefecit et creavit; eidemque Johanni nomen stilum titulum et honorem baronis de Faunhope imposuit dedit concessit et assignavit. Volens et concedens eidem quod ipse nomen baronis de Faunhope habeat et gereat, &c. sedem quoque et locum suis in parliamentis et comitiis regis inter cæteros barones dicti regni Angliæ habeat et possideat.* Rot. Parl. v. iv. 400. West. 65.

§ 62. These letters patent are expressed to be made with the consent of parliament; and Mr. West, or whoever was the author of the enquiry attributed to him, has observed that upon inspection of the various creations of peers from Pa. 65.

11 Ed. III. to the 1 Hen. VII. he found almost all of them, except some that were grants of escheated feudal honors, to have been made and passed by the authority of, and in full parliament; and that there was no instance, except that of Beauchamp of Holt, who never sat as a peer, of a baron being created by patent, otherwise than in parliament.

§ 63. It should however be observed that the enquiry into the manner of creating peers, though it contains a good deal of learning, is no more than an anonymous tract, published in the year 1719, when a bill was pending for limiting the number of peers; and was evidently written for the purpose of showing that the crown could not formerly confer a peerage without the consent of parliament; a doctrine which never existed in England, where the crown has always been held to be the fountain of honor; and which is contradicted by the following parliamentary record.

Rot. Parl. v. iv. 267.

§ 64. A contest for precedence having arisen in the parliament of 3 Henry VI. between the earl marshall and the earl of Warwick, the commons interfered, stating, they understood that the earl marshall's father had been created duke of Norfolk by letters patent made in 21 Richard II., and if so, then the earl marshall was entitled to precedence. The letters patent were produced; and it is stated, that the dignity had descended to the earl marshall, who claimed thereby to have precedence over the earl of Warwick.

The judgment is, that although all the proceedings in the parliament of 21 Richard II. were revoked and annulled in the parliament of 1 Henry IV. *pro eo tamen quod hujusmodi creatio ducum sive comitum, aut aliorum dignitatum, ad solum regem pertinet, et non ad parliamentum.* And as no special revocation of the grant of the said dukedom appeared in the roll of that parliament; and as several other persons on whom dignities had been conferred, in that parliament, by king Richard II., had always enjoyed the same; the king, with the consent of the lords spiritual and temporal, and commons, declared, that the earl marshall should have and enjoy the dignity of duke of Norfolk. And he took his seat accordingly.

§ 65. There are some instances of dignities created by act of parliament, as in the case of the barony of Lumley. But in these there was first a restitution of blood, as heir to a person attainted; and as such restitution did not operate as a reversal of the ancestor's attainder, so as to restore the son to the ancient dignity, a new barony of the same name with that which the ancestor had, is given by the restoring act. Infra, c. iv.

§ 66. In all letters patent by which dignities are created, there is a clause of investiture, similar to that contained in the ancient charters of creation of personal dignities. And in the manuscript already mentioned is the following account of the creation of a baron by letters patent. Investiture.

§ 67. "At this day the order of creating a baron by patent, now in use, is as thus: The king sitting in state, garter principal king at arms cometh toward the king, bearing the patent of creation in his hand, the other heralds going before him, two by two; next them a baron bearing the robes, and after him the person that is to be created, between two other barons. At their coming into the room where the king is, they make low obeisance three times, then garter delivers the patent to the lord chamberlain of the household, who gives it to the king, and the king gives it to one of the secretaries of state, who reads it. At the word *investimus*, the king puts on the robes; and when the patent is all read, it is delivered again to the king, who gives it to him that is created, who returns thanks for this great honor, then withdraws in the same manner as he came in." Thus was William Cecil created lord Burghley by queen Elizabeth, the fifteenth of February, in the thirteenth year of her reign, anno 1571.

§ 68. Dugdale says, the solemn investiture of barons, created by letters patent, was performed by the king himself, by putting on the new baron a robe of scarlet, and a hood furred with minever. That this form continued till 13 James I., when the lawyers declared, that the delivery of the letters patent was sufficient, without any ceremony; and in the modern patents of creation, the public ceremony of investiture is dispensed with by express words. Baronage, vol. ii. 195. Collins, 122. Id. App. No. 5.

§ 69. Selden states, that in the reign of king Richard II. Creation

Money. Id. § 10. c. 2. § 112. lands, as well as rents of good value, are assigned in the patents of earls—*Pro statu comitali decentius et honorificentius sustentando et manutenendo;* as the words sometimes are. Sometimes also the yearly rent of twenty pounds, out of the profits of the county is given to the person created; *sub nomine comitis.* 2 Inst. 9. And lord Coke observes, that in such a case the earl did not pay relief, as for an earldom, because he did not hold this land or rent *per comitatum*, or *nomine comitis.*

§ 70. The same practice prevailed in the creation of barons. Id. § 28. Thus Selden says, that Sir Ralph Botiller, being created baron of Sudley, by king Henry VI., the following clause is inserted in the letters patent: *Ut idem Radulphus et hæredes sui prædicti melius decentius et honorificentius valeant statum prædictum, ac onera ipsis incumbentia manutenere et sustentare;* had two hundred marks annuity given him out of the profits of Lincolnshire.

§ 71. It is said in Dyer's Reports, 2., that if a man were created a duke, and for the maintenance of his dignity, the king had granted him twenty pounds, as an annuity, he could not alien it, because it was incidental to the dignity.

The practice of granting annuities of this kind has long since ceased.

A sitting not necessary. § 72. In the case of letters patent, the creation is perfect and complete, as soon as the great seal is put to the patent; 1 Inst. 16. b. in consequence of the following clause, which is inserted in all patents of this kind: *Et quod dictus et hæredes sui masculi prædicti, et eorum quilibet, habeat teneat et possideat sedem locum et vocem in parliamentis comitiis et consiliis nostris, hæredum et successorum nostrorum infra regnum nostrum Angliæ, inter alios comites, ut comes.*

12 Rep. 71. § 73. It is said by the judges in lord Abergavenny's case, "but if the king creates any baron by letters patent under the great seal, to him and his heirs, or to him and his heirs of his body, or for life, &c., there he is a nobleman presently; for so he is expressly created by letters patent of the king, which cannot be countermanded; and he ought to have a writ of summons to parliament, of right, and of course; and he shall be arraigned before any parliament."

§ 74. It follows, that although a person ennobled by letters patent should die without taking his seat in the house of lords, yet the dignity will descend to his posterity.

§ 75. Thus Henry Waldegrave having been, by letters patent, 1 James II., created baron Waldegrave de Chewton, to him and the heirs male of his body, but dying without having taken his seat, his eldest son was introduced in his robes, and took his seat as heir to his father. Journals, vol. xxi. 682.

§ 76. It is laid down by lord Coke, that when a person is created a peer by letters patent, the state of inheritance must be limited by apt words, or else the grant is void. There must be words of limitation.

§ 77. The usual limitation in letters patent is to the heirs male of the body of the grantee. In some it is confined to his heirs male by a particular woman; and in some few it is limited, in default of heirs male, to heirs general, or to the eldest heir female. 1 Inst. 16. b. Vide infra, ch. v.

§ 78. A dignity, which was originally created by writ, may be revived or restored by letters patent; and in such a case the letters patent have been called letters of restitution. Restitution by letters patent.

§ 79. Colonel Thomas Twistleton claimed the barony of Say and Sele; and his petition being referred to the house of peers, he stated in his printed case, that in letters patent 1 James I., reciting that James Fenys, knight, son of William Fenys, knight, who was son and heir of Joan, one of the daughters of Geoffrey Saye, lord of Saye, was by king Henry VI. summoned by writ the 3d of March, in the 25th year of his reign, to the parliament at St. Edmundsbury, by the name of James Fenys, knight, lord Say and Sele. Barony of Say and Sele. Printed case 1781.

That on the 5th of the same month in the presence of the three estates of the same parliament, and with the consent of the lords spiritual and temporal, the aforesaid James was raised, made and created a baron of England, by the style, title and honor of baron Say and Sele.*

That William Fenys, knight, lord of Say and Sele, the son and heir of the said James was by writ summoned to par-

* Nothing of this kind appears either in the close rolls or the patent.

liament several times in the reign of king Henry VI. and king Edward IV.

That Henry Fenys lord of Say and Sele, the son and heir of the said William Fenys lord of Say and Sele, had, by right of inheritance, enjoyed the honor of baron Say and Sele. But it is not stated that he was ever summoned to parliament, and it is admitted that three more generations passed without a writ of summons.

That his majesty, by his said letters patent, not only recognized, allowed, ratified, and confirmed to the said sir Richard Fenys (who was the fifth in descent from William Fenys, the person last summoned), and the heirs of his body, the title and dignity of baron Say and Sele, but also constituted and created the said sir Richard Fenys, the claimant's ancestor, baron of Say and Sele, to hold to him and the heirs of his body.

That upon the death of the said sir Richard Fenys, baron of Say and Sele, the honor descended to William Fenys, his son and heir; who, by letters patent in 22 James I., was raised, made and created a viscount, by the style and title of viscount Say and Sele, to hold to him and the heirs male of his body.

That the said William Fenys, or Fiennes, baron and viscount Say and Sele, died in the year 1662, leaving issue James, his eldest son and heir, and three other sons, Nathaniel, John, and Richard.

That James, the eldest son, succeeded his father, as baron and viscount Say and Sele, and died in 1673, without issue male, leaving only two daughters, Elizabeth and Frances his coheiresses; whereupon the said barony of Say and Sele became in suspension or abeyance, and the viscounty passed to William, son of Nathaniel, the second son of the first viscount, as the heir male of his body.

That Elizabeth Fiennes, the eldest daughter, married John Twistleton, and left issue only one daughter, Cecil, her heir at law, who married George Twistleton, and died 1723, leaving issue Fiennes Twistleton, his eldest son and heir.

That Frances, the second daughter of James lord Say and

Sele, married Andrew Ellis, and left issue only one daughter, who died without issue in 1715: whereupon the suspension or abeyance of the barony of Say and Sele was determined.

That Fiennes Twisleton died in 1730, leaving issue a son named John, who, in 1633, presented his petition to king George II., claiming the barony of Say and Sele, as heir general of the body of the said sir Richard Fenys; and the same was referred to the then attorney general, afterwards lord chief justice Willes, who reported thereupon that the said John Twisleton had clearly proved his pedigree, and that he was the heir general of the body of the said sir Richard Fenys, baron of Say and Sele; wherefore it seemed to him that the then petitioner had made out his claim, and that he had a right to be summoned to the then parliament by the title of baron of Say and Sele, which petition and report thereupon were referred to the house of peers, but no resolution appeared to have been made by that house on the claim. Printed case 1733.

That the claimant was the then eldest son and heir to the said John Twisleton, and the attorney general reported that he was the heir general of the body of the said Richard Fiennes, created baron of Say and Sele by king James.

The house of lords resolved and adjudged that the petitioner, colonel Thomas Twisleton, had made out his claim as heir general of the body of sir Richard Fenys, baron of Say and Sele, created by letters patent in the first year of the reign of king James I. 21 June, 1781.

A writ of summons was issued to him accordingly.

§ 80. Every woman who is married to a peer becomes entitled to the same dignity as her husband; and acquires all the rights and privileges of peerage, which are consistent with her sex. Thus, if she is accused of treason or felony, she can only be tried by the house of peers. Dignities by Marriage.

§ 81. This appears to have been formerly doubted; for by the stat. 20 Hen. 6. c. 9. it is declared, that ladys of great estate, in respect of their husbands, peers of the land, married or sole, that is to say, duchesses, countesses, or baronesses, shall be put to answer, and judged before such

peers of the realm, as other peers of the realm should be, if they were indicted or impeached, and in like manner and form, and none otherwise.

Countess of Rutland's case, 6 Rep. 52.

§ 82. An information was preferred in the star chamber in 3 James I. against certain serjeants at mace, for arresting the widow of the earl of Rutland. The lord chancellor Egerton, the two chief justices, and chief baron resolved, that the person of one who was, in law, a countess by marriage, or by descent, was not to be arrested for debt or trespass. For although, in respect of her sex, she could not sit in parliament, yet she was a peeress of the realm, and should be tried by her peers; as appeared by the statute 20 Henry VI., which was but a declaration of the common law; and there were two reasons why her person should not be arrested in such cases, one in respect of her dignity; and the other, in respect that the law presumed she had sufficient lands and tenements in which she might be distrained.

Ante, § 81.

1 Inst. 16. b. 6 Rep. 53. b.

§ 83. If a woman, who has acquired a dignity by marriage, afterwards marries a commoner, she loses her dignity, and all the rights and privileges annexed to it. For that which is gained by marriage, may be lost by marriage. *Eodem modo quod quid constituitur, dissolvitur.*

Journ. v. xv. 241.

§ 84. This doctrine appears to have been formerly doubted; for it was declared by the house of peers in 1691, that if the widow of any peer shall be married to a commoner, she shall not be allowed privilege of peerage.

1 Inst. 16. b.

§ 85. Lord Coke says, "if a woman is noble by birth or descent, whosoever she marries, yet she remains noble; for birthright is *character indelibilis*; so, if a woman be created a peeress, she will not lose her dignity by marrying a commoner."

Id. 19. b.

§ 86. Lord Coke also says, "if a duchess by marriage afterwards marries a baron, she remains a duchess, and does not lose her name, because her husband is noble.

Mr. Hargrave, in a note to this passage, observes, that in some books it is said if a woman, noble by marriage, marries one of inferior nobility, she shall be stiled by the dignity of her second husband; and this appears the better opinion, for at the coronation of king George III. the duchess dowager of

Vide 21 H. 8. c. 13. § 33.

Leeds, then the wife of lord Portmore, claimed to walk as a duchess, but was refused.

§ 87. It is said by Mr. Justice Doddridge, that if a woman, who acquires a dignity by marriage, elopes from her husband, she will lose her dignity. "For as then every woman shall lose her dower, so being advanced to titles of dignity by that husband, by such elopement she loses them." I have not, however, seen any case that confirms this assertion. Collins, 130.

§ 88. The crown being the fountain of honor, may confer dignities on any person whatever; no qualification being required for that purpose. "Their number" (says Sir William Blackstone) is indefinite, and may be encreased at will by the power of the crown; and once in the reign of queen Anne there was an instance of creating no less than twelve together." On whom Dignities may be conferred. 1 Comm. 517.

§ 89. Soon after the Union with Scotland, queen Anne, by letters patent, conferred the dukedom of Dover on the duke of Queensbury, a Scotch peer, to hold to him for his life, and afterwards to his second son Charles, then earl of Solloway in Scotland, in tail male; and the duke of Queensbury was allowed to take his seat in the house as an English duke. On peers of Scotland.

§ 90. Three years after, James, duke of Hamilton in Scotland, was by letters patent created duke of Brandon, in England: but the house refused to admit him to his seat as an English peer, and resolved, "That no patent of honor granted to any peer of Great Britain who was a peer of Scotland, at the time of the Union, can entitle such peer to sit and vote in parliament; or to sit upon the trial of peers." Journals, v. xix. 546.

A strong protest was entered against this resolution.

§ 91. Charles, earl of Solloway, claimed in 1719, the dukedom of Dover, under the limitations in the letters patent, by which his father was created to that title. The case was referred by the crown to the house of peers, where it was argued on behalf of the claimant, that the difficulty arose from the resolution of the house in the duke of Hamilton's case. That the articles of the Union affecting this question, were the 4th, 22d, and 23d. By the 4th, it was enacted, "that from the time of the Union there shall be a communication of Dukedom of Dover, 1 Peere Williams, Rep 582.

all rights and privileges belonging to each kingdom, except where it is otherwise expressly agreed by the articles." By the 22d it was agreed, "that by virtue of the treaty of Union, sixteen shall be the number of peers of Scotland, to sit and vote in parliament." And by the 23d, "that these sixteen peers shall have all the privileges of the peers of parliament of Great Britain. Also that the rest of the peers of Scotland shall have all the privileges of the peerage of England, excepting only that of sitting and voting in parliament."

That in these articles it was difficult to find out words which could be thought to disable the king from granting to a Scotch peer a patent of peerage of Great Britain, with the privilege of sitting in parliament; or which disabled a Scotch peer from accepting such a patent. Especially when the rule of law was (and it was a rule without exception) that the prerogative of the king, of which the law was so regardful, could not be taken away by any act of parliament, without plain and express words; more especially so valuable a part of the prerogative, whereby the crown was enabled to encourage the merit of subjects, by bestowing on them honors and titles.

That the words of the articles seemed so far from importing any such disability, that there was not so much as a negative in any of the articles. There was indeed what seemed to be the reverse of this construction. The fourth article saying, "There shall be a communication of all rights and privileges between the subjects of either kingdom, except where it is otherwise expressly agreed by the articles." And there was nothing expressed to the contrary in any of the articles; so that the subjects of each kingdom, without any preference, disadvantage, or discouragement, were to be equally capable of the sovereign's favor; and surely the Scotch peers were subjects, as well as others; and it was the intention of these articles to encourage the subjects to do their best service to their sovereign.

It was admitted that, by the treaty of Union, only sixteen were to represent the peers of Scotland. But though in virtue thereof only sixteen peers were to be elected, yet this did not hinder but that, by letters patent, more peers might be cre-

ated. It was submitted whether it could be intended by the above-mentioned articles of Union, that those Scotch peers should be in a worse condition than the meanest of their fellow subjects; in a worse condition than those who are no subjects, but aliens, nay, worse than criminals; since by such construction of the articles as would disable peers of Scotland from sitting in the house of lords, by letters patent, all those things before mentioned were implied. For it was in the power of the king, if it was his pleasure so to do, to make a servant of a Scotch peer, a peer of Great Britain; and then it were pretty strange that the king should not be able to make the master so.

It was in the power of the king, for such merits as he alone was the judge of, to bestow honors on the meanest of his subjects. It was in his power to make an alien a denizen, and then a nobleman. It was in the crown's prerogative to pardon a criminal; and if it were the royal pleasure, and such criminal should have done service to the crown, of which the crown alone was to judge, such criminal might be made a peer. And it seemed harsh to say that a nobleman of Scotland, by all the services of his life, could not make himself capable of becoming a peer of Great Britain, and of voting in parliament, by virtue of a patent. But that if he were to commit treason, and be attainted, by which he would forfeit his Scotch peerage, and then were to be pardoned, from the time of such pardon, he would be capable of being a peer of Great Britain, with the full privilege of sitting in parliament. Upon the whole matter, as the patent under which the claim was made, had been allowed in the time of the claimant's father, who in two successive parliaments did sit and vote; and no objection could be made to this claim, but what likewise had been made against that of his father; so it was hoped the house would be of the same opinion, as to the son's sitting among them, as their lordships had been of in the case of his father, it being upon the same patent, their lordships would admit him to his seat.

It was resolved and adjudged that the duke of Dover had no right to a writ of summons to parliament. Journals, v. xxi. 196.

§ 92. The doctrine established in the two preceding cases was reluctantly submitted to for a long time. But a descendant of the duke of Hamilton, who had been created duke of Brandon, having claimed that dignity in 1782, the house of peers, after consulting the judges, came to a resolution in favor of the claimant, which effectually overturned their former resolutions on this point.

Dukedom of Brandon. Printed case, 1782.

§ 93. Douglas duke of Hamilton, being the great grandson and heir male of James duke of Hamilton, who was created duke of Brandon in 1711, claimed that dignity. The case being referred by the king to the house of peers, the committee of privileges put the following question to the judges:

Journals, vol. xxvi. 516.

"Whether, by the 23d article of Union, which declares all peers of Scotland to be peers of Great Britain, with all the privileges enjoyed by the peers of England, except the right and privilege of sitting in the house of lords, and the privileges depending thereon; the peers of Scotland be disabled from receiving, subsequently to the Union, a patent of peerage of Great Britain, with all the privileges usually incident thereto."

The lord chief baron delivered their unanimous opinion: "That by the 23d article of the act of Union, which declares all peers of Scotland to be peers of Great Britain, with all the privileges enjoyed by the peers of England, except the right and privilege of sitting in the house of lords, and the privileges depending thereon, the peers of Scotland are not disabled from receiving, subsequently to the Union, a patent of peerage of Great Britain, with all the privileges usually incident thereto."

"The house reported to his majesty, that having consulted the learned judges, and considered their answer, which was unanimous, to a question of law which arose in the course of their examination, they certified their humble opinion and advice, that the duke of Hamilton was entitled to his writ of summons."

A writ of summons was issued to him accordingly, and he took his seat as duke of Brandon.

§ 94. Since the above decision a great number of Scotch

peers have had English dignities conferred on them, which have been admitted by the house of lords.

§ 95. It appears somewhat doubtful, whether a person can refuse or waive a dignity conferred on him by the crown. Whether a dignity can be refused.

Lord Coke thought he could not. "If (says he) the king calleth any knight or esquire to be a lord of parliament, he cannot refuse to serve the king, *in illo communi consilio*, for the good of his country. 4 Inst. 44.

§ 96. In the case of the dukedom of Dover it was said, that by the patent the dukedom was limited in remainder to the second son of the original grantee, by his then title of earl of Solloway; and the pretended disability against his having the privilege of sitting in the house, as an English peer, and as duke of Dover, was, that at the time of the Union, he was a Scotch peer, namely, earl of Solloway. Now the honor of the earldom of Solloway was granted to him when an infant; and it was said to be a rule of law that, in the case of an infant, a grant made to him, during his infancy, might be waived and disclaimed by him when he came of age. And the known diversity was, that what came to an infant by descent, which was the gift of the law, that he could not waive; but whatever came to the infant, by the gift or grant of another, might be relinquished by him when of age. Also, it was said to be plain that whatever an infant did waive or refuse, when of age, it then became the same thing as if the grant had never been made to him. Now a grant of a peerage was within the same rule of law, in this and other respects, as a grant of land. A dignity or barony was intailable within the words lands and tenements, and comprised therein, 1 Inst. 20. Again, a dignity or barony, though intailed, was comprised within the statute 26 Henry VIII. c. 17. by the words lands, tenements, and hereditaments; and therefore was, though intailed, forfeitable for treason. And generally speaking, dignities and honors were governed by the same rules of law as lands; some few instances only, for particular reasons excepted. Consequently, as an infant, when of age, might refuse or waive a grant made to him of lands, so might he refuse a grant of an honor made to him during his infancy; and exactly for the Ante § 91.

same reason, for an honor might be loaded with an incumbrance, as well as land. And in this case, as some would have it, the Scotch peerage, from the time of the Union, was in fact clogged and loaded with a great incumbrance; such an incumbrance as was a perpetual disability to the peer, and his issue, in all succeeding generations, from sitting in the house of peers. Wherefore, it was plainly for the benefit of the claimant, who had two honors granted to him during his infancy, one of which, the Scotch peerage, was inconsistent with the English one, to waive and refuse such Scotch peerage, granted him during his infancy; and by accepting of the dukedom of Dover, to elect to serve the sovereign in that capacity; which seemed to take in all that was implied in the other, and more.

The claimant only contended that an honor, granted to an infant, might be waived by him when of age. That this being agreeable to the known rules of law, in relation to estates granted to infants, it seemed incumbent on the other side, who opposed the duke's sitting in the house, to produce precedents showing that an infant could not waive an honor, as well as land, granted to him during his infancy.

However, they should cite lord Abergavenny's case, in
12 Rep. 70. which it was said by the judges that the person summoned might excuse himself to the king, or might have waived it, and submitted himself to his fine. So that, from this case, it was said to appear that the party, though of age, might refuse being made a peer: and if so, much more when an infant.

Mr. Peere Williams reports lord Cowper to have been of opinion that the king could not create a subject a peer of the realm against his will, because then it might be in the power of the king to ruin any subject, whose estate and circumstances might not be sufficient for the honor.

Lord Trevor *contrà*, that the king had a right to the service of his subjects in any station he thought proper. And instanced the case of the crown's having power to compel a subject to be a sheriff, and to fine him for refusing to serve.

Also lord Cowper held that a minor might waive, when of age, a peerage granted to him during his infancy, especially

in this case, it being a Scotch peerage, and amounting to no more than a grant of a disability. But lord Trevor observed that, in lord Abergavenny's case, it was admitted the king might fine a person whom his majesty thought fit to summon by writ to the house of peers; it being said there that a person might choose to submit to a fine; and if it were allowed, the king might fine one for not accepting the honor, and not appearing upon the writ; the king might fine *toties quoties* where there was a refusal, and consequently might compel the subject to accept of the honor. That it was not to be presumed the king would grant a peerage to any one to his prejudice or wrong, any more than he would make an ill use of his power of pardoning; all which were suppositions contrary to the principles upon which the constitution was framed, which depended upon the honor and justice of the crown.

It appears from the journals, that the king's counsel for Scotland were heard upon the question, How far, by the law of Scotland, at the time of the Union, a patent to create an infant a peer of Scotland might be refused or waived, at his coming of age, or at any time after? and therefore the resolution against the claim must have been founded upon the principle, that by the law of Scotland, a person could not refuse or waive a patent of peerage granted him during his infancy. But this decision does not conclude the point, as to an English dignity. Vol. xxi. 196.

CHAPTER IV.

WHAT ESTATE MAY BE HAD IN A DIGNITY, AND ITS INCIDENTS.

§ 1. *Dignities are real Property.*
2. *Need not be of any Place.*
7. *What Estate may be had in a Dignity.*
11. *A Dignity may be intailed.*
15. *With a Remainder over.*
18. *Or granted for Life.*
22. *No Curtesy of a Dignity.*
34. *Dignities formerly alienable.*
43. *But are now unalienable.*
45. *Might be surrendered to the King.*
49. *But this is altered.*
51. *Not extinguished by a new Title.*
§ 55. *An Earldom does not attract a Barony.*
61. *Dignities forfeited by Attainder for Treason.*
66. *But those in Remainder are not affected.*
69. *And for Felony.*
71. *Except Dignities in Tail.*
74. *Corruption of Blood.*
81. *Does not extend to intailed Dignities.*
86. *Restitution of Blood.*
92. *Dignities may be lost by Poverty.*
96. *Are not within the Statutes of Limitation.*

SECTION I.

Dignities are real property.

ALL dignities or titles of honor having been originally annexed to lands, were considered as tenements or incorporeal hereditaments, wherein a person might have a real estate. And although dignities are now become little more than personal honors, and rights, yet they are still classed under the head of real property.

Need not be of any place.

7 Rep. 34. a.

12 Rep. 81.

§ 2. In conformity to this principle, it was formerly held that a dignity must have been created of some particular place, in order that it might appear to be annexed to land, and thereby become a real hereditament.

§ 3. In the first patent of a barony, the dignity is created of a particular place. And in 28 Henry VI. Thomas Percy was created by letters patent, a baron by the stile and title of baron Egremont:—*Quod quidem dominium est infra comitatum Cumbriæ.* And after the usual words, that the grantee should enjoy the dignity of a baron, as fully as other barons, the following singular clause is added:—*Aliquo statu seu*

feoffamento per prædictum Thomam aut aliquem hæredum suorum, de dicto dominio de Egremont, aut de aliqua inde parcella ad eorum usum, quovismodo alicui fiendis, non obstantibus.

§ 4. In the case of Mr. Knollys, who was indicted for killing a person in a duel, he pleaded a misnomer, that he was earl of Banbury. To this plea the counsel for the crown took three exceptions, one of which was that it did not appear that Banbury was in England. Lord Holt was of opinion that the place from which a patentee took his title need not be in England, nor in reality was it necessary that there should be any place. Albemarle was not in England, and, nevertheless, at the time of Magna Charta there was an earl of that title; and there had been dukes who had lately borne that title. 1 Lord Raym. 10. 1 Inst. 20. a. n. 3.

§ 5. Where a person is created a baron of a particular place, that place, though a family mansion, does not thereby become the *caput baroniæ;* so as to exclude the widow from being endowed of it.

§ 6. Sir Thomas Gerard, having been created lord Gerard, of Gerards Bromley, by letters patent, he being then resident with his family in the said capital messuage; a question arose in a writ of dower brought by the widow of a lord Gerard, whether the said capital messuage became thereby the *caput baroniæ;* and it was resolved that it did not, because it was not a feudal barony, for the authorities cited must be intended of feudal baronies. And this privilege was allowed to them because they ought, upon necessity, to defend the realm, to which they were bound by tenure. For the king, at the creation of the barony, gave to the baron, lands and rents, to hold of him by the defence of the realm, But then this could not be a feudal barony, for it was in the seisin of the Gerards before, and therefore was not given to the Gerards by the king at the creation of the barony to hold of him. Gerard v. Gerard. 5 Mod. 64, 12 — 83. 3 Lev. 401. 1 Lord Raym. 72.

The widow recovered dower of the mansion house.

§ 7. With respect to the estate which may be had in a dignity; while dignities were annexed to the possession of certain castles or manors, the persons who were seised of those castles or manors, if they were tenants in fee simple of them, would have had the same estate in the dignity. What estate may be had in a dignity.

1 Inst. 27. a. Ch. ii.

§ 8. A person may also have a qualified fee in a dignity. Thus, it has been stated that king Henry VI. by letters patent granted to John Talbot, that he and his heirs, lords of the manor of Kingston Lisle in Berkshire, should thenceforth be lords and barons Lisle: by which lord Coke says, John Talbot had a fee simple qualified in the dignity; determinable upon his or their ceasing to be lords of the manor of Kingston Lisle. The reason of this limitation, however, was that the dignity of a baron was at that time considered as inseparably annexed to the possession of the manor of Kingston Lisle, as appears from the letters patent which have been transcribed in a former chapter.

1 Inst. 16. b.

§ 9. As to dignities created by writs of summons to parliament, lord Coke says: "And it is to be observed that if he be generally called by writ to Parliament, he hath a fee simple in the barony, without any words of inheritance."

This expression is, however, not accurate, and lord Coke has corrected it in the same page, by adding: "And thereby his blood is ennobled to him and his heirs lineal."

§ 10. Dignities of this kind being descendible to females, have generally been called dignities in fee; but a person having a dignity by writ is not tenant in fee simple of it, for in that case it would descend to the heirs general, whether lineal, or collateral, of the person last seised: whereas a dignity of this description is only inheritable by such heirs as are lineally descended from the person first summoned to parliament, and not to any other heirs. It is in fact a species of estate not known to the law in any other instance, except that of an office of honor.

A dignity may be intailed.

§ 11. As dignities were originally annexed to lands, they were considered as tenements, and real estate, and held to be within the statute *de donis*. And although dignities have long ceased to be connected with lands, yet as every peer was formerly created of a particular place, the judges continued to consider dignities as in some respects connected with lands, and consequently intailable. Thus it was resolved by all the judges in 7 James I., that where Ralph Neville was by letters patent created earl of Westmoreland, to him and the heirs

Neville's case. 7 Rep. 33.

male of his body, an estate tail was thereby created in the dignity, and not a fee simple conditional at common law; and the judges observed that with this resolution agreed divers precedents, and the experience and practice always used. This doctrine has, however, been lately doubted. 1 Inst. 20. a.

§ 12. It was resolved in the following case that a grant of a a dignity by act of parliament, to a person and his heirs male, created an estate tail in the dignity.

§ 13. Robert de Vere, duke of Ireland and earl of Oxford, was attainted in 11 Richard II. by parliament, of high treason, and adjudged to forfeit all his castles, seignories, lands, tenements, &c. Earldom of Oxford. Collins, 173.

By an act of parliament, in 16 Richard II., that prince being willing that the estate and name of earl of Oxford (though they were forfeited) should not cease, but should continue in future time, to the honor of the kings of the realm, restored, gave, and granted, by assent of parliament, to Aubrey de Vere and his heirs male for ever, the estate and honor of earl of Oxford: and in full parliament he took his ancient place and did his homage.

A contest arose in the year 1626, in consequence of the death of Henry de Vere, earl of Oxford, respecting the right to that earldom, between Robert de Vere, claiming under the entail created by the act of 16 Richard II., as heir male of Aubrey de Vere, and lord Willoughby de Eresby, claiming as heir general to the last earl. W. Jones, 96.

The case was referred by king Charles I. to the house of lords, who called to their assistance lord chief justice Crew, lord chief baron Walter, Dodderidge and Yelverton, justices, and baron Trevor.

Their opinion on this point was delivered by lord chief justice Crew, whose exordium is so eloquent that it shall be transcribed: "This great and weighty cause, incomparable to any other that hath happened at any time, requires great deliberation, and solid and mature judgement to determine it; and I wish that all the judges of England had heard it (being a case fit for all), to the end we all together might have given our humble advice to your lordships herein. Here is re-

presented to your lordships *certamen honoris*, illustrious honor. I heard a great peer of this realm and a learned, say, when he lived there was no king in christendom had such a subject as Oxford. He came in with the conqueror earl of Guynes; shortly after the conquest made great chamberlain, above five hundred years ago, by Henry I., the conqueror's son, brother to Rufus; by Maud the empress, earl of Oxford: confirmed and approved by Henry Fitz Empress, Henry II., *Alberico Comiti;* so earl before.

"This great honor, this high and noble dignity hath continued ever since in the remarkable surname of De Vere by so many ages, descents, and generations, as no other kingdom can produce such a peer in one and the self same name and title.

"I find in all this length of time but two attainders of this noble family, and those in stormy and tempestuous times, when the government was unsettled, and the kingdom in competition.

"I have laboured to make a covenant with myself that affection may not press upon judgement; for I suppose there is no man that hath any apprehension of gentry, or nobleness, but his affection stands to the continuance of so noble a name and house; and would take hold of a twig or twine thread to uphold it. And yet time hath his revolutions; there must be a period and an end to all temporal things, *finis rerum*, an end of names and dignities, and whatsoever is terrene, and why not of De Vere; for where is Bohun? Where is Mowbray? Where is Mortimer? Nay, which is more, and most of all, where is Plantagenet? They are entombed in the urns and sepulchres of mortality. And yet let the name and dignity of De Vere stand so long as it pleaseth God."

The lord chief justice and his brethren were unanimously of opinion that although the earldom of Oxford was originally held in fee simple by the family of De Vere, yet "that the honor of the said earldom was entailed upon Aubrey de Vere and his heirs male, by the parliament of 16 Richard II.; and that an estate therein to the heirs male was sufficiently raised and created thereby, and was so reputed and enjoyed by

many descents of the earls, which could not have been (as the same was limited), if the same had only been an ordinance of parliament, and that the said honour descended, and then of right belonged to Robert de Vere as heir male of the said Aubrey, by virtue of the said intail."

The house of lords resolved that the earldom of Oxford was descended, and ought of right to go to the heir male, *nemine dissentiente.* 22 March, 1625. Journ. v. iii. 537.

The next day Robert de Vere took his seat as earl of Oxford.

§ 14. By a private act of parliament in 3 Charles I., it is enacted that the title, name, and dignity of earl of Arundel, and castle, honor, and lordship of Arundel, and the titles, names, and dignities of lord Fitz Allen, lord of Clun and of Oswaldstre, and lord Maltravers, and all places, pre-eminences, arms, ensigns, and dignities to the said earldom, castle, honor, and baronies belonging, together with the castle and honor of Arundel, and several estates should be settled to Thomas then earl of Arundel, and the heirs male of his body, remainder to the heirs of the body of the said earl, remainder to lord William Howard, uncle of the said earl, and the heirs male of his body, remainder to the heirs of the body of the said lord William Howard, remainder to the said Thomas earl of Arundel and his heirs; with a proviso that none of the persons to whom an estate of inheritance should descend by force of this act should alien or convey away any of the said castles, honors, &c. nor any other thing do which should be to the disherison of the heirs inheritable by force of this act. Vide Recital, ante c. ii. § 122.

§ 15. An estate in remainder may be limited in a dignity, to commence after the determination of a preceding estate tail. Thus in Neville's case the judges state that the earldom of Northumberland was intailed by Queen Mary to Thomas Percy, and the heirs male of his body; and for default of such issue, that Henry his brother should be earl, to him and the heirs male of his body. With a remainder over. Vide Fearne, 529. 7 Rep. 34. a.

In the same manner A. Dudley was by Queen Elizabeth created earl of Warwick, to him and the heirs male of his

body; and for default of such issue, that R. his brother should be earl in like manner.*

Edin's Rep. v. ii. 379.

§ 16. In 1 Edw. VI., Edward earl of Hertford was created duke of Somerset, to hold to him and the heirs male of his body, and of Anne his then wife; and if he should die without such issue, that then Edward Seymour, the son of the said earl of Hertford, by Catherine his first wife, and the heirs male of the body of the said Edward Seymour, should enjoy the said title.

Vide infra, c. v.

§ 17. In the act of parliament respecting the earldom of Arundel, that dignity and several baronies which were then descendible to heirs general, were limited to the then earl of Arundel and the heirs male of his body, with several remainders over.

Or granted for life. 1 Inst. 16. b. 9 Rep. 67. b.

§ 18. Lord Coke says, the king may create a man or a woman noble for life, but not for years; because it might go to executors or administrators. And it has been already stated, that king Richard II. created Robert de Vere marquis of Dublin, for life.

Rot. Parl. v. 4. 96.

Thomas Beauford earl of Dorset, was created duke of Exeter, by king Henry IV., without any words of limitation: from which Dugdale concluded, that he was only tenant for life of that dignity.

Vol. iii. 264.

§ 19. There is a charter in the rolls of parliament, by which king Richard II. created Edward the eldest son of his uncle, Edmund, duke of York, earl of Rutland; to hold the said title, stile, name, and honor to the said Edward, during the life of the said duke his father.

Seld. Id. c. 9. § 1.

§ 20. King Richard II. created Margaret, countess of Norfolk, duchess of Norfolk for life; and king James I. created lady Mary Compton, who was mother to the duke of Buckingham, countess of Buckingham for her life.

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* In lord Purbeck's case, Show. 11., it is said *arguendo*, that if honors be intailed, it is not of the same nature with other inheritances. Neither doth any lord sit here by title of a remainder; but by virtue of a new grant in the same patent. Vide 1 Lord Raymond's Rep. 52.

§ 21. There are several modern instances of dignities granted to a person for life, with a remainder over.

Thus in 1784, Hugh duke of Northumberland was created lord Louvaine, baron of Alnwicke, in the county of Northumberland, during his natural life, with remainder to his second son, Algernon Percy, and the heirs male of his body.

So in 1786, George duke of Montague was created lord Montague of Boughton, in the county of Northampton, during his natural life, with remainder to his grandson, Henry James Montague, second son of the duke of Buccleugh, and the heirs male of his body.

§ 22. While dignities were annexed to the possession of particular castles or manors, the husband of a woman seised of such castles or manors was bound to perform the services that were due to the crown for them; and among others, to attend parliament. No curtesy of a Dignity. Dug. Sum. Pref. Collins, 28.

§ 23. Thus it appears from Dugdale's summons to parliament, that Ralph Monthermer, who had married the dowager countess of Gloucester, was summoned to parliament in 27 Edw. I., as earl of Gloucester, and to all succeeding parliaments, during her life; when she died, her son became earl of Gloucester, and Monthermer was summoned as a baron. Vin. on Brook, tit. Gloucester.

§ 24. King Henry VI., by letters patent in the twenty-seventh year of his reign, reciting that Thomas lord Dacre, one of the barons of England, and of such state and dignity to him and his heirs, he did inherit, was dead; and unto whom Joan, the wife of Richard Fenys, knight, was cousin and next heir, being daughter of Thomas, eldest son of the said lord Dacre: his majesty, in consideration of the premises, did accept, declare and repute the said knight to be lord Dacre, and one of the barons of the realm. Collins, 25.

§ 25. Where there was issue, the husband became tenant by the curtesy of the dignity. Thus lord Coke mentions a case in the reign of king Henry VI. where a person was allowed to hold the dignity of earl of Salisbury, as tenant by

the curtesy, in right of his wife Alicia, the daughter and heir of the preceding earl of Salisbury, by whom he had issue.

1 Inst. 29. b. § 26. Lord Coke also says, the name of the issue which that earl of Salisbury had by the said Alicia, was Richard, who married with Anne, the sister and heir of Henry Beauchamp, earl of Warwick, who was earl of Warwick, to him and his heirs male of his body; and Richard the son having then no issue by his wife, king Henry VI., in the 27th year of his reign, granted to him that he should be earl of Warwick: *Licet ipse et prædicta Anna exitum inter eos ad presens non habet.*

Collins, 11. § 27. In the reign of king Henry VIII., Mr. Wymbish having married a lady entitled to the dignity of Taylboys, a question arose, whether he ought to have the name of lord Taylboys, in right of his wife, or not.

The king consulted the two chief justices, doctor Gardiner, bishop of Winchester, and garter.

First, the king demanded of the two chief justices, whether by law Mr. Wymbish ought to have the name of lord Taylboys, in right of his wife or not.

They answered that the common law dealeth little with the titles and customs of chivalry, but such questions had always been decided before the constables and marshals of England.

Then the king moved the question to doctor Gardiner, who answered, that by the law which he professed, dignities were denied both to women and jews.

I like not that law, quoth the king, that putteth christian women and jews in the same predicament.

That law, said doctor Gardiner, as I take it, is to be intended of dignity, whereunto public office is annexed. For in France, women succeed to their ancestors, as well in dignities as in patrimonies. Therefore, the custom of every region is to rule those things.

Then the king asked garter of the custom of England, who answered that it had always been so used in England, as in France, that the husband of a baroness by birth, should use the stile of her barony, so long as she lived; and if he were

tenant by the curtesy, then that he might use it for the term of his life.

The chief justice confessed that custom, concerning the tenant by the curtesy, to be consonant to the common law; for the common law admitteth him to all his wife's inheritances, of which she was seised during the coverture, and that might descend to their issue; and the dignity was parcel of the inheritance: which doctor Gardiner confessed, adding that the law granting the more, which was the possession of the barony, could not be intended to deny the less, which was the dignity, a thing incident to it.

As it standeth with the law, said the king, that tenants by the curtesy should have the dignity; so it standeth with reason. But I like not that a man should be this day a lord and to-morrow none, without crime committed; and it must so fall out in the husband of a baroness, if she die, having never had by him any children.

The chief justice confirmed, that in that point, the common law dissented not much from the king's reason; for the husband that never had issue was thought to have no interest in law in his wife's inheritance, more than in respect only that he was a husband: but having a child, then he acquired a state in law, and was admitted to do homage, and not before.

The king, for resolution, said, that forasmuch as by their speeches he understood that there was no force of reason nor law to give the name to him that had no issue by his wife; that neither Mr. Wymbish, nor none other from thenceforth, should use the title of his wife's dignity: but such as by curtesy of England had also right to her possessions for term of his life. The which opinion the persons aforenamed applauded, and so the sentence stood.

§ 28. Notwithstanding this royal recognition of the right to curtesy in dignities, a claim to a dignity on this ground was soon after rejected.

§ 29. About the year 1580, Richard Bertie claimed the barony of Willoughby in right of his wife Catherine, duchess of Suffolk, and baroness Willoughby, as tenant by the curtesy. Willoughby de Eresby. Collins, 1.

The claim was referred by queen Elizabeth to lord Burghley, and two other commissioners; as also a claim to the same dignity by Peregrine Bertie, the son of the claimant

The commissioners made their report in favor of the son, who was accordingly admitted to the dignity, in the lifetime of his father.

1 Inst. 29. b. note 1.

§ 30. Mr. Hargrave observes, that notwithstanding this decision, two other claims of the like kind were made in a few years after. The first about 1586, by Sir Thomas Fane, in right of his wife Mary, the daughter and heir of Henry lord Bergavenny. And the second about 1604, by Sir Sampson Lennard, in right of his wife Margaret lady Dacres.

Of the event of the former claim, he did not find any account; but as to the latter, it appeared that king James I. referred it to commissioners, and that lady Dacres dying before any decision, the affair was compromised in 1612, by the king's granting precedency to the husband, as eldest son of lord Dacres.

Collins, 24.

Idem, 30.

The letters patent, by which this precedency was granted, recite, that the commissioners found baronies in the like right conferred on the husband in several families; and in the particular barony of Dacres, three several precedents.

Idem.

§ 31. Mr. Hargrave also observes, he could not learn that there had been any claims of dignities by curtesy since lord Coke's time; and from the want of modern instances of such claims, and from some late creations, by which women had been made peeresses, in order that the families of their husbands might have titles, and yet the husbands themselves continue commoners, it seemed as if the prevailing notion was against curtesy in titles of honor. However, he had not discovered whether this great question had ever formally received the judgment of the house of lords.

§ 32. It may also be observed that there are some modern instances of persons sitting in parliament as heirs to their mothers' dignities, in the lifetime of their fathers; which would not have been allowed, if their fathers had an estate by the curtesy in those dignities.

§ 33. Thus the present duke of Northumberland was allowed

to take his seat in parliament, as baron Percy, immediately after the death of his mother, though his father was then living. Journ. v. xxxv. p. 249.

In the same manner, the present marquis Townsend was allowed to take his seat in parliament, as baron Ferrers of Chartley, upon the death of his mother, though his father was then living. Journ. v. xxxiv. p. 145.

§ 34. Madox says, dignities by tenure were never alienable; for the king being the foundation of honor, no man, or number of men, without the king, could ever make an earl or baron. To grant a baronial title was an act of royalty, inseparable from the crown, and incommunicable to subjects. In the first place, when land baronies were in being in England, a man could not purchase and enjoy an honor or barony, without the king's consent. There must have been a royal licence made to the grantor to grant, and to the grantee to purchase or take such honor. In the next place, a man could not become *homo*, or *baro regis*, without doing homage to the king. If the king was not pleased to accept his homage, he could not purchase or hold an honor. Thirdly, a man could not have seisin of an honor, without having it from the king's hand. Every honor originally passed from the king, and upon every change by death or otherwise, returned to the king again, and remained in his hands until he commanded seisin of it to be delivered to his homager, according to the law or custom of noble fiefs. Fourthly, there never was (for aught he knew) an instance of any man's coming into seisin of an honor by purchase or contract made with a subject. Dignities formerly alienable. Baron. Angl. 23. Rep. 397.

§ 35. Madox is so far right, that dignities were never alienable without the consent and concurrence of the crown. But there are several instances of the alienation of dignities with such consent.

§ 36. Thus in the reign of king Henry III., Ranulph earl of Chester and Lincoln, conveyed the earldom of Lincoln to his sister, by a charter which Mr. Selden has published. The words are,—*Ranulphus comes Cestriæ et Lincolniæ, omnibus præsentibus, &c. ad universitatis vestræ notitiam volo pervenire,* Id § 10.

me dedisse concessisse et hac præsenti carta mea confirmasse dominæ Hawisiæ de Quenci, sorori meæ charissimæ comitatum Lincolniæ; scilicet quantum ad me pertinuit; ut inde comitissa existat; habendum et tenendum de domino meo rege Angliæ et heredibus suis eidem Hawisiæ et heredibus suis, quietè planè pacificè, et integrè, jure hæreditario, cum omnibus libertatibus ad prædictum comitatum pertinentibus.

Idem. § 37. Selden says, that this Hawisia was thence styled *comitissa Lincolniæ*, in a writ of *nuper obiit*, brought by her other co-partners, after her brother's death; and that, at her request, the king granted the same earldom, which it seems she herself had first granted, that so the king's grant might enure as a confirmation, to her son John de Lacy.

Id. c. 9. § 4. § 38. Selden also states, that Simon de Montfort, earl of Leicester in fee, died leaving two sons, Almarique and Simon. Almarique, the eldest, granted and released all his right to Simon; and so he was earl of Leicester, and received his investiture from the king.

RyleyPlac. Parl. 547 —557. Collins, 227. § 39. By letters patent in 7 Edward II. reciting, that Edmund Deyncourt (who was baron Blankeney) having no issue male, and being desirous that his surname and arms might continue, had petitioned his majesty for leave to enfeoff whom he pleased of his manors and arms.

The king granted him his licence to enfeoff any person of his manors, &c. so as the same might remain after his decease to William Deyncourt, and the heirs male of his body.

§ 40. By other letters patent in 10 Edward II., the king granted his licence to enfeoff Oliver and John Deyncourt of the manor and soke of Blankeney, &c. (which was his barony), and that the said Oliver and John should re-enfeoff the said Edmund of the same, to hold during his life, and after his decease to the said William Deyncourt, and the heirs male of his body.

4 Inst. 126. § 41. Lord Coke says, it appeared from the close rolls that this Edmund sat in parliament until and in 18 Edward II., and that after his decease, his assignee sat in parliament in 1 Edward III. by the name of William Deyncourt; and in his heirs male the dignity, surname, and possessions continued

until 21 Henry VI., and then his heirs male, together with the name and dignity, ceased.

§ 42. Lord Coke also says, he heard lord Burghley vouch a record in the reign of Edward IV., that the lord Hoe, having no issue male, by his deed under his seal, granted his name, arms, and dignity over. But having not the king's licence and warrant, the same was in parliament adjudged to be void. Idem.

§ 43. The power of alienating dignities by tenure appears to have ceased before the time of king Henry VI. It being pretty clear that, in the reign of that prince, a dignity could not be created by the mere conveyance of a baronial estate. For, in the case of the barony of Lisle, the gift of the manor to which that dignity had been annexed, by the countess of Shrewsbury, to her own son, John Talbot, does not appear to have given him a complete right to the dignity; for letters patent from the crown were also obtained, in order to confer the baronage on him. And when dignities ceased to be annexed to the possession of lands, and came to be considered as mere personal inheritances, it appears to have been settled that a dignity was an hereditament inherent in the blood of the first grantee, and his lineal descendants, and therefore unalienable. But are now unalienable. Ante, c. ii.

§ 44. In the case of the barony of Grey of Ruthyn, the house of lords made the following resolution:—"Upon somewhat which was spoken of in the argument concerning a power of conveying away an honor; it was resolved upon the question, *nemine contradicente*, that no person that hath any honor in him, and a peer of this realm, may alien or transfer the honor to any other person." Journ. v. iv. 150.

§ 45. This resolution cannot be considered as having the authority of a law; but it is now understood that dignities are absolutely unalienable.

§ 45. A dignity or title of honor might formerly be surrendered to the crown, of which there are several instances. Thus in 4 Henry III. Andrew Giffard baron of Pomfret in fee surrendered that dignity to the king. So in 23 Henry III., Simon Mountford, being earl of Leicester, and desirous to Might be surrendered to the king. Collins, 301.

take that honor from his eldest son, who had another title, and to give it to his second son, he surrendered it to the king, who regranted it accordingly.

Vol. iv. 272. Rymer's Fœd. v. i. p. 2. 940.

§ 46. In the rolls of parliament, 3 Henry VI., there is a surrender of the earldom of Norfolk, by Roger Bigod, to the crown, of which the words are, — *Sciatis nos reddidisse remisisse et omnino quietum clamasse pro nobis et hæredibus nostris magnifico principi et domino nostro karissimo domino Edwardo Dei gratia regi Angliæ illustri quicquid juris honoris et dominii hujusmodi nomine comitis in comite Norff' et mariscalciam Angliæ; habendum et tenendum eidem domino regi et hæredibus suis, cum omnibus et singulis ad ea qualitercunque spectantibus quocunque nomine censeatur, quieta de nobis et hæredibus nostris imperpetuum. Ita quod nos vel hæredes nostri seu aliquis nomine nostro nihil juris vel clamei in eidem aut suis pertinentibus quibuscumque de cetero vendicare poterimus vel habere. In cujus rei testimonium, &c.*

Collins, 10

§ 47. Sir Charles Brandon being affianced to Elizabeth viscountess Lisle, who was an infant of tender years, obtained letters patent in 5 Henry VIII. creating him viscount Lisle, to him and his heirs by the said Elizabeth. "But having shortly after happened on a fatter morsel, he yielded up the letters patent to be cancelled." *

Collins, 301.

§ 48. In 1639, Roger Stafford claimed the barony of Stafford as the grandson and heir male of Henry lord Stafford, eldest son of Edward duke of Buckingham. King Charles I. intending to create Sir William Howard, son to Thomas earl of Arundel, who had married the sister of Henry Stafford, the last heir male of the elder branch of that family, baron Stafford; it was advised that there might be a fine levied by the said Roger of this barony to the king, which was done accordingly.†

But this is altered.

§ 49. This doctrine has been altered; for it was resolved

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* Charles Brandon married the queen dowager of France, sister to king Henry VIII.

† It was formerly a common practice for persons who had peerages, created by letters patent, to return them to the crown, in order that they might be cancelled.

by the house of lords, in the case of the barony of Grey of Ruthyn, — "That no peer of this realm can drown or extinguish his honor; but that it descends to his descendants; neither by surrender, grant, fine, nor any other conveyance to the king." And some years after, the validity of a surrender of a dignity by fine to the king being questioned, it was resolved by the house of lords, upon great deliberation, and after hearing the attorney-general, that such a surrender was void. Journ. v. iv. 150.

§ 50. John Villers was created baron Villers, of Stoke, and viscount Purbeck, in 1619, by letters patent to him and the heirs male of his body. Purbeck Viscounty. Collins, 293.

In 1660, Robert Villers his son, on whom these dignities had descended, and who was accused of treasonable practices during the rebellion, petitioned king Charles II. to accept of his dignity; and his majesty's counsel being of opinion that he might legally surrender his dignities to the crown, a fine was accordingly levied by lord Purbeck of all his dignities to the king. Journ. v. xi. 93.

In 1675, Robert Villers, the son of the above-named Robert, petitioned his majesty for the dignities of viscount Purbeck and baron Villers, which being referred to the attorney-general (sir William Jones), he reported, that forasmuch as it was a considerable question never resolved, that he knew of, whether a peer could by fine, bar or extinguish an entailed honor, he recommended that the petition should be referred to the house of peers. Idem, v. xii. 673.

A reference was accordingly made by his majesty to the house of peers, where it was argued on behalf of the petitioner that this was a personal dignity, annexed to the blood; and so inseparable and immoveable, that it could not be either transferred to any other person, or surrendered to the crown. It could move neither forward nor backward, but only downward to posterity; and nothing but deficiency or corruption of blood could hinder the descent. Sir William Jones endeavoured to support the surrender upon the authority of several ancient precedents; and among others, those that have been already stated. Journ. v. xiii. 182. Show. Parl. ca. 1.

Journ. id. 253.

The house of lords came to the following resolution:

"Forasmuch as upon debate of the petitioner's case, who claims the title of viscount Purbeck, a question in law did arise, whether a fine, levied to the king, by a peer of the realm, of his title of honor, can bar and extinguish that title. The lords spiritual and temporal in parliament assembled, upon very long debate, and having heard his majesty's attorney-general, are unanimously of opinion, and do resolve that no fine now levied, or at any time hereafter to be levied to the king, can bar such title of honor, or the right of any person claiming under him that levied or shall levy such fine."

Vide infra, c. vi.

Not extinguished by a new title.

§ 51. It appears to have been formerly doubted whether a barony created by writ was not extinguished by the acceptance of a new barony by writ of the same name.

Delawarre barony. 11 Rep. 1. Collins, 122.

§ 52. The lord Delawarre being in sore displeasure with William West, his nephew and heir, procured an act of parliament 3 and 4 Edward VI., by which the said William West was, during his natural life only, disabled to claim, demand, or have any manner of right, title, or interest, by descent, remainder, or otherwise, in or to the manors, lands, tenements, hereditament, title, or dignity, of the said Thomas lord Delawarre, his uncle.

Thomas lord Delawarre died; and in 8 Elizabeth, William West was called to parliament by writ of summons, and had place in parliament according to his creation; for that, by the said act of parliament, he was excluded to challenge the former ancient barony.

Upon the death of William West, a question arose, whether his son should have the place of his grandfather.

Journ. v. ii. 193. 196.

The matter was referred by queen Elizabeth to the house of lords, who referred it to lord Burghley, then lord treasurer, and others, who heard counsel in the presence of the two chief justices, and divers other justices.

It was objected, that William West had accepted of a new creation of the queen, which dignity, newly gained, did descend to the petitioner, which he could not waive, and therefore the petitioner could not have other place than his father had. To which it was answered and resolved, that the acceptance of a

new creation by the said William could not hurt the petitioner, because the said William was at that time disabled; and in truth was not a baron but only an esquire: so that when the old and new dignities descended together, the old should be preferred.

But this was to be noted, by the reasons made for the said resolution, that if William West had been a baron, and entitled to, or in possession of the ancient dignity, when he accepted the creation, the law perchance might have been otherwise, but that remained unresolved.

§ 53. It seems, however, to have been soon after settled, that the acceptance of a new dignity does not merge or destroy an ancient one. For lord Coke says, "That the greater dignity doth never drown the lesser dignity, but both stand together in one person; and, therefore, if a knight be created a baron, yet he remaineth a knight still. And if the baron be created an earl, yet the dignity of a baron remaineth, *et sic de cæteris.*" 2 Inst. 594.

§ 54. In the case of the barony of Willoughby de Broke, which will be stated in the next chapter, it was resolved by the house of lords, that the grant of a new barony of Willoughby de Broke to sir Foulk Greville and the heirs male of his body by letters patent, he being then in possession of the ancient barony of Willoughby de Broke, which had been created by writ, did not destroy such ancient barony, but the same continued and descended to his sister and sole heir, and from her to sir Richard Verney, who was seated in the house of lords according to the date of the ancient barony.

An earldom does not attract a barony

§ 55. An opinion formerly prevailed, that where a person having a barony by writ, and consequently descendible to his heirs general, was created an earl to him and the heirs male of his body, the earldom attracted the barony, so that it could not afterwards be separated from it.

Barony of Roos. Collins, 162. An. 1617.

§ 56. Sir Thomas Manners being seised of the barony of Roos, which was created by writ and descendible to his heirs general, was created earl of Rutland to him and the heirs male of his body.

The earldom and barony descended to Edward Manners,

who died in 1587, leaving issue an only daughter, Elizabeth. Upon his death, the earldom descended to his younger brother. Elizabeth, his daughter, married William Cecil, eldest son of lord Burleigh, and died leaving issue a son, William Cecil, who claimed the barony of Roos.

It was contended, on the part of the earl of Rutland, that the acceptance of an earldom by a baron, with such restraint of descent to the heirs male of his body, though the baron were before in fee simple, was in substance and law a surrender of the barony invested in him before; and that both the old and new dignity were settled together, and restrained into one course of descent; that is, into an estate tail, to pass with the earldom, which being the greater carried the lesser with it.

Collins, 172.

This case was compromised by king James I., who by letters patent, in the fourteenth year of his reign did accept and declare the said William Cecil to be lord Roos, and to be so reputed, named, and called, and to have and use the ancient seat and place of lord Roos; and that the said Francis earl of Rutland should be accepted and declared and called lord Roos of Hamelake, and his son and heir, according to the laudable custom of England, should enjoy the said name title and dignity of lord Roos of Hamelake, Trusbutt, and Belvoir, in parliaments and other assemblies.

Barony of Roos, An. 1666.

§ 57. By the death of William Cecil without issue, in 1618, the barony of Roos reverted to Francis the sixth earl of Rutland, who had issue only one daughter, married to George Villiers duke of Buckingham, whose son George the second duke of Buckingham claimed the barony of Roos, which was opposed by the then earl of Rutland, upon the ground that where a baron in fee simple was made an earl, to him and the heirs male of his body, the earldom should attract the barony, and they could not be severed. Not that the barony was merged in the earldom, but rather suspended.

Collins, 261.

The house of peers did not come to any resolution on this case; but the doctrine that an earldom attracted a barony was entirely exploded in the following cases:

§ 58. Lord Grey de Ruthyn, being a baron by writ, was created earl of Kent to him and the heirs male of his body, by letters patent; and had issue two sons, the eldest of whom had issue a daughter only, and died. Barony of Grey de Ruthyn. Collins, 195.

In 1640, Mr. Longville claimed the barony of Grey of Ruthyn as heir to this daughter. The claim was opposed by the earl of Kent, and it was contended by Mr. Selden on behalf of the earl, that the custom of honor, and therefore the law, in cases of descents of dignities was, when a barony by writ was once involved into an earldom, it should wait upon such earldom, and might not after be transferred to another family by a daughter and heir, so long as the earldom continued in the male line.

It was however resolved by the house of lords that the barony descended to the daughter of the eldest son; and through her to the claimant; and the earldom to the younger brother. Consequently that the earldom did not attract the barony. Journ. v. iv. 149.

§ 59. So where the earldom becomes extinct, the barony will notwithstanding descend to the heir general.

§ 60. The claim of Mr. Mildmay to the barony of Fitzwalter in 1668, was referred by his majesty to the house of lords; where the question respecting the attraction of a barony by an earldom was argued at great length by the attorney-general, Mr. Montague, on behalf of the crown, and Mr. Offley on behalf of the claimant; but the parliament being prorogued, no resolution was entered into. Barony of Fitzwalter Collins, 268.

In the next year, the case was heard before the king and council, assisted by the two chief justices, lord chief baron Hale, the king's chief serjeant, attorney and solicitor general.

The petitioner deduced his pedigree from Robert Fitzwalter, who was summoned to parliament by writ, in 23 Edward I, and several times after, and had sat in parliament pursuant to such writs.

The title descended to Robert Fitzwalter, who was created viscount Fitzwalter, and earl of Sussex, by king Henry VIII. This earl of Sussex had two sons, Henry earl of Sussex and sir Humphrey Ratcliffe: Henry had two sons, Thomas earl

of Sussex, who died without issue, and Henry earl of Sussex, who had issue Robert earl of Sussex, who died without issue, and one daughter, lady Frances, who married sir Thomas Mildmay, to whom the petitioner was heir.

It was contended that the barony was merged and extinct in the earldom, by coming to Edward the last earl of Sussex, who died without issue.

The question being put to the judges, they unanimously agreed, that "If a baron in fee simple be made an earl, the barony will descend to the heir general, whether the earldom continue or be extinct." With which opinion and resolution his majesty being fully satisfied, a writ of summons was issued to the claimant, by the title of lord Fitzwalter.

Dignities forfeited by attainder for treason. Neville's case, 7 Rep. 33

§ 61. All dignities or titles of honor, whether held in fee simple, fee tail, or for life, are forfeited and lost by the attainder for high treason of the persons possessed of them.

§ 62. Charles Neville, earl of Westmorland, to him and the heirs male of his body, by letters patent, was attainted of high treason by outlawry, and by act of parliament, and died without issue male. And in 2 James I., Edward Neville claimed to be earl of Westmorland, as heir male of the body of the first grantee.

This case, by command of the king, was propounded to all the judges, who resolved, that although the dignity was within the statute *de donis conditionalibus*, yet that it was forfeited by a condition in law, *tacitè*, annexed to the estate of the dignity. For an earl has an office of trust and confidence, and when such a person, against the duty and end of his dignity, takes not only counsel, but also arms against the king, to destroy him, and thereof is attainted by due course of law, by that he hath forfeited his dignity; in the same manner as if tenant in tail of an office of trust misuse it, or use it not; these are forfeitures of such office for ever, by a condition annexed to their estates.

It was also resolved, that if this dignity had not been forfeited by the common law, it would have been forfeited by the statute 26 Henry VIII., c. 13. by which all estates of inheritance are declared to be forfeited to the king, upon conviction of high treason.

§ 63. The honorable Mr. Charles Yorke, in his Considerations on the Law of Forfeiture, has thus justified this doctrine; "As to honors they have so far been alienable amongst us in former times, that a man might, by surrender, restore them to the crown, that fountain from which they flowed. The law is now differently understood in this respect; but they are not alienable, like most other inheritances, since that would be to debase and prostitute them, yet they seem peculiarly the proper object of forfeiture, for being in a stricter sense than other kinds of property, the gift and creation of society, the terms on which they are given must be infinitely subject to its power. And is it not natural and politic that a distinction bestowed only for the praise of them who do well, should be forfeitable on the commission of crimes, for a terror to evil doers." Pa. 50. 4th ed.

§ 64. Persons upon whom judgment of high treason is pronounced, or who are outlawed upon an indictment for high treason, are said to be attainted of treason. A person may also be attainted of treason by a special act of parliament, of which there are many instances; and all the ancient acts of attainder are considered as having been passed on the first day of the sessions of parliament in which they were made.

§ 65. In the year 1787, Andrew J. Drummond, esq. claimed the Scotch dignity of viscount Strathallan, stating that William Drummond, viscount Strathallan, and James his eldest son, having joined the pretender in the year 1745, an act of parliament was passed, 19 George II. enacting, that if the said W. viscount Strathallan, and James Drummond, should not surrender themselves on or before the 12th July, and submit to justice, then they should from and after the 18th April, 1746, stand and be adjudged attainted of high treason. Printed case.

This act was brought into parliament the 8th of May, 1746, and received the royal assent the 4th of June following.

W. Viscount Strathallan died on the 16th April, 1746, and the claimant contended that this act, as to W. Viscount Strathallan could have no effect whatever, he having died on the 16th of April: and his son did not consider himself as re-

quired to surrender, nor as attainted by force of the act, there being no description in it applicable to him, who was a peer of the realm, and not James Drummond, esq. at the time the act was introduced and passed.

The following question was put to the judges; whether James Drummond was or was not attainted by virtue of the statute 19 George II. c. 26.

The lord chief baron Eyre delivered the unanimous opinion of the judges present, that he was attainted. After stating the terms of the act, and taking notice of its recital, that W. Viscount Strathallan, James Drummond, esq., his eldest son and heir apparent, and others had, on or before the 18th April, 1746, levied war against the king; and its enactment, that if they did not surrender on or before the 12th July, they should from and after the said 18th April, stand attainted; proceeded in these words: — "The claimant would have James Drummond's attainder depend on the fact of William lord Strathallan having died on the 6th of April, 1746. Evidence of that fact had been given, of which the house were the judges. Supposing the fact to be so, the claimant's argument proceeds; that James Drummond having thereby become viscount Strathallan, could not be attainted by the description of James Drummond, esq., eldest son and heir apparent of, &c. This argument assumed, that he was so described after he became a viscount. The answer was, that he was not. For the act relates to the first day of the session, which was in October, 1745. In the ordinary course of judicial proceedings, the conviction must have related to the time of the treason. But parliament is not so bound. Parliament may pronounce on men's future conduct. This act is as judgment pronounced; but the effect of it is suspended. Evidence was offered to prove, that the act passed on the 4th June, 1746. But the house would not receive it. By rejecting this evidence, the house has decided on the whole cause. If it was not passed on that day, when should it be said to have passed? Undoubtedly on the first day of the session. In the contemplation of law, the whole session makes but one day. So the terms in the courts of law are,

as of the first day. The assizes are supposed to last but one day. It is entered on the rolls of parliament, that this act was made in the session held in October, 1745; no evidence can be admitted to overturn this record. Nothing but a special enactment, in the body of an act, can control the legal relation to the first day. This was solemnly settled in the late, and very strong case of the King *v.* Panther. The claimant was obliged to admit the general rule; but he would make this act an exception. He says, it states facts as having happened in April, 1746, and relies on the attainder being made to operate from and after the 18th of that month. lord John Drummond's case was referred to, in which it was determined, that incumbrances were avoided by the act, only if subsequent to the 18th April. That was in conformity with the common law, but did not bear on this question, which was whether any day, except the first day of the session could be fixed on for its commencement. It was impossible on the face of this act to fix on any other day. And it was absurd to say, it should be held to commence on a day not fixed. It speaks of the 18th April, as a day from whence a certain effect was to take place. It speaks of the 12th July as a day for another effect. Neither of these days can be called the commencement. The not fixing a day shewed the sense of the legislature, that the common rule should apply. A strong case had been stated of an act which in the body of it declared that something was to take place from the next Whitsuntide. The session had begun before Whitsuntide, but Whitsuntide was passed while the act was in the course of going through the house. The Whitsuntide of the following year was meant; but it was observed that, according to the words of the act, joined to the rule, Whitsuntide next must be the Whitsuntide past, and therefore it was altered to Whitsuntide next but one, meaning not the *second* Whitsuntide after the act really passed, but the first Whitsuntide, according to the original intendment.

Brown's Parl. Ca. vol. vi. 466.

William viscount Strathallan was dead when this act really passed. Was he attainted? Perhaps he was not. But that must be not on account of any defect in the act, or because

he died on the 16th April; but because he died before the 12th July, 1746, the day of surrender; and it would be presumed that he would have surrendered, had he lived.

The claimant was here seeking to take an advantage, to defeat the plain intendment of the legislature; for it could not be disputed that his father was meant to be attainted by the act. It could not be regretted therefore, if there should be a rule which went to support the legal intendment, though grounded on a fiction. — The claim was rejected.

But those in remainder are not affected.

§ 66. Where a person is tenant in tail male of a dignity, with a remainder over in tail male to another, and such person is attainted of high treason, the dignity is forfeited, as to him and his issue male; upon the principle laid down by Plowden 557, that if a donee of land is attainted of treason, the crown shall have the land as long as there are any heirs of the body of the donee. But upon failure of issue male of the person attainted, the dignity becomes vested in the remainder man, or his male descendant.

7 Rep. 34. a.

§ 67. Thus it is said in Neville's case, that by the attainder for high treason of Thomas Percy, who was earl of Northumberland, to him and the heirs male of his body, with remainder to his brother Henry Percy, in the same manner; Henry Percy became earl of Northumberland; but this was because Thomas Percy had no son, for it is stated in Collins's peerage, that Thomas Percy was beheaded at York in 1572, and did not leave any issue male.

Vol. ii. 321. last edit.

§ 68. The celebrated Henry St. John, was created viscount Bolingbroke by queen Anne in 1712, to him and the heirs male of his body, remainder to his father sir Henry St. John, and the heirs male of his body. Lord Bolingbroke was attainted of high treason in 1715, by act of parliament, and though he afterwards obtained a partial repeal of the act of attainder, yet his dignity was never restored. Upon his death without issue, in 1751, Frederick St. John, the grandson and heir male of the body of sir Henry St. John, succeeded to the estate in remainder in the dignity. The entry in the journals is — "Frederick viscount Bolingbroke, claiming by virtue of a special limitation contained in a patent granted to

Vide infra, Earldom of Airlie. Vol. xxviii. pa. 204.

his uncle Henry, late viscount Bolingbroke, dated 7th July, 11 Anne, was introduced in his robes, and took his seat."

§ 69. The issue must be capable of inheriting the dignity, otherwise the remainder will take effect.

Printed cases, 1754.

Thus in the case of Gordon *v.* the King's Advocate, the following question was put to the judges by the house of lords: — "Tenant in tail male of lands in England, with remainder over, is attainted of high treason, and the estate tail thereby forfeited to the crown. After this attainder, tenant in tail has issue male born in foreign parts, out of the ligeance of the crown of Great Britain, and dies leaving such issue male. — *Quere*, Is the estate or interest in the lands which were forfeited to the crown as aforesaid, continuing or determined?

The lord chief baron of the court of exchequer, having conferred with the other judges present, delivered their unanimous opinion, that the estate or interest in the lands so forfeited to the crown, as aforesaid, was determined."

In consequence of this opinion, the person who was next in remainder recovered the estate from the crown.

And for Felony.

§ 70. A dignity created by writ, and descendible to heirs general, is also forfeited by attainder of felony of the person possessed of it. For lord Coke says, if he was noble or gentle before, he and all his posterity are, by the attainder, made ignoble.

1 Inst. 41. b.

Collins's Peer. vol. vi. 555.

§ 71. Mervin Touchet, baron Audley by writ in England, and earl of Castlehaven in Ireland, was attainted of felony and beheaded in 1631. His son was created lord Audley, and earl of Castlehaven, by king Charles I., and having faithfully served that prince, he obtained an act of parliament 29 & 30 Cha. II., entitled "An act for restoring the honor of baron Audley of Hely, to James lord Audley, and others therein mentioned." And the lords Audley have ever since had precedence according to the date of the ancient barony.

Lords' Journ. vol. 13. pa. 141, 2.

Except Dignities in tail.

§ 72. But an intailed dignity is not forfeited by attainder of felony, except during the life of the person attainted. For the statute 26 Hen. VIII. c. 13., by which estates tail are made forfeitable for high treason, does not extend to attainders for felony.

1 Inst. 392. b.

Dugd. Bar. vol. ii.

§ 73. Sir John Stourton was created baron Stourton in 26 Hen. VI. by letters patent, to him and the heirs male of his body. The dignity descended to Charles seventh lord Stourton, who was convicted of murder, and hanged in 1557. He left three sons. John the eldest received a writ of summons to parliament on the 11th February, 1575, and was placed immediately above lord Latymer, in the seat of his ancestor. In Dugdale's baronage, it is said that this John was restored in blood, by act of parliament; but this is a mistake, for though an act was brought in for the restitution of blood of John lord Stourton, yet that was on the 7th March following, on which day it appears from the journals that lord Stourton sat in the house; so that the object of the act must have been to enable lord Stourton to derive pedigree through his father, and the act never passed.

Journ. vol. i. pa. 731.

Id. pa. 742, 3 & 9.

Vide Eden's Rep. vol. ii. 377.

§ 74. Lawrence earl Ferrers, to whose ancestor the dignity had been granted by letters patent in 1711, to hold to him and the heirs male of his body, was convicted of murder, and executed in 1760.

Earldom of Ferrers.

At the end of the honorable Mr. Eden's publication of cases, from the manuscripts of lord Northington, there is an argument of lord C. B. Parker, upon the effect of earl Ferrer's attainder; in which, after stating lord Stourton's case, he lays it down that dignities, whether created of a particular place, or not, were intailable within the statute *de donis;* and that lord Nottingham in his speech in the house of lords, in the case of Robert Villers, claiming the title of viscount Purbeck, declared his opinion, that intailed honors, notwithstanding any corruption of blood, were preserved by the statute of Westminster 2., against all forfeitures for felony, though not against treason, without distinguishing whether those honors were in their creation from some certain place or not.* And the chief baron concludes by saying that lord

Ante, § 50.

* I am indebted to the honorable Mr. R. H. Eden, for the following note of lord Nottingham's speech in the Purbeck case: "As to the objection that an honor is not within the statute of Westm. 2. *de donis,* nothing is got by it if true, for if not, it remains a fee simple conditional; and a

keeper Northington was so well satisfied that the attainder of earl Ferrers of felony and murder, did not affect his next brother Washington Shirley's right to the earldom, that his lordship granted him his writ, and the rest of the lords concurred in opinion with the lord keeper, or at least acquiesced in it, for he took his seat in parliament as earl Ferrers; so that this point was settled by the highest authority. Journ. vol. xxix. pa. 690.

§ 75. An estate tail in remainder in a dignity, is not forfeited by the attainder for felony of the preceding tenant in tail of it. Thus, when Edward, earl of Hertford, was attainted of felony, and died leaving issue male by his wife Anne, which did not fail till the year 1749, when Sir Edward Seymour, the then heir male of the body of Edward Seymour, to whom the remainder was limited, was summoned to parliament as duke of Somerset, and took his seat under the letters patent of 1 Edward VI. Ante, § 16. Eden's Rep. vol. ii. 379. Infra, c. v.

§ 76. In the case of a dignity created by writ, which is descendible to heirs general; the attainder of the heir apparent for treason or felony, if he survives his ancestor, will destroy it. For the heir apparent is incapable of inheriting it in consequence of his attainder, and his blood being corrupted, no title can be derived through him, so that the dignity becomes vested in the crown by escheat, and is thereby merged and destroyed as effectually as if it had been forfeited. Corruption of blood.

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surrender by fine works more strongly upon a fee simple conditional. But on the other side there is very much lost by it, and the peers are all undone, if the objection be true, and that honors cannot be intailed, for then no remainders can be limited of an honor, after an estate tail; and this may concern and degrade many of your lordships. But that which concerns all of you is, that then all honors will be forfeitable for felony, as appears by lord Audley's case, who, being a baron in fee simple, was attainted of felony, and though his son, by a patent of restitution, did long usurp the old precedence, yet that being now looked into, the son was fain, this sessions, to be restored by act of parliament. Whereas all intailed honors, notwithstanding any corruption of blood, are preserved by the statute Westm. 2. against all forfeitures for felony, though not against treason. So that no small privilege is lost if an honor cannot be intailed within the statute Westm. 2."

Consid. on forfeiture. 4th ed. 72.

§ 77. This doctrine is thus explained by Mr. Yorke: "It is a principle in all states, where a man is neither a subject by birth, or express compact, or has voluntarily renounced the mutual obligations, to consider him as not within their obedience or even notice. But where he has forfeited his civil rights by crime, he is regarded as still subject to their power; and in every respect within the strict consideration of the law. That the ancient common law of England clearly proceeds upon this principle, where a man was not capable of civil rights by nature, as an alien born, and never naturalized, being unknown to the law, he was excluded from inheriting; and the next of kin within the allegiance, who did not claim under him was admitted. Or where he had incurred civil disabilities by his own voluntary act, not criminal; as one who entered into religion, or abjured the realm; he was taken to have undergone civil death, and the next in course of descent entered. But where he is attainted of treason or felony, the law will not pass him over, and marks him out, *in rei exemplum et infamiam.* Hence it is that though he was never in possession, nor those who claim under him more capable of inheriting than he, by reason of the consequential disability, arising from the attainder of the ancestor; yet the estate will be interrupted in its course to the collateral."

§ 78. In consequence of this principle it has been resolved by the house of lords, that where the eldest son of a person possessed of a barony by writ was attainted of high treason, and died in the lifetime of his father, leaving issue, the barony reverted to the crown, and became extinct.

Barony of Lumley. Journ. v. xxii. 298. Collins, 373.

§ 79. The Rev. Robert Lumley Lloyd claimed in 1723 the barony of Lumley, which was created by writ of summons in 8 Richard II. as being heir to Ralph lord Lumley, the person first summoned to parliament.

It appeared that the title descended to John lord Lumley, and that George Lumley his eldest son was attainted of high treason in 29 Henry VIII., and died in the lifetime of his father, leaving issue John Lumley, who died without issue. That Spandian Lloyd was his cousin and next heir, namely eldest son of Barbara Williams, sister of the said John lord

Lumley. That Spandian Lloyd died without issue, and that Henry Lloyd his next brother had issue, Henry his eldest son, who was father to the claimant.

The earl of Scarborough opposed the claim, and it was contended by his counsel that George Lumley being attainted and executed in the life of John lord Lumley his father; upon the death of the said John lord Lumley, the said barony became extinct.

The house resolved that the petitioner had not any right to a summons to parliament, as prayed by his petition.

This resolution must have been founded upon the principle that the barony had reverted to, and was merged in the crown, in consequence of the attainder of George Lumley. That attainder not having been reversed. Vide infra.

§ 80. It is, however, a rule of law, that the attainder of a person who need not be mentioned in the derivation of the descent, does not impede, and therefore where one may claim as heir to an ancestor, without being obliged to derive his descent through an attainted person, he will not be affected by such an attainder. Thus if a man has two sons, and the eldest is attainted of treason, and afterwards the father dies seised of an estate in fee simple, the younger brother cannot inherit from his father, for the elder brother, though attainted, is still a brother, and no other can be heir to the father, while he is alive; so that the estate escheats to the crown. But if the elder brother dies in the lifetime of the father, without issue, the younger brother will then inherit from the father, because he can derive his descent from him, without claiming through, or even mentioning his brother. Dyer, 48. a. Hob. 334. Cro. Car. 435. 1 Hale P.C. 356.

§ 81. Corruption of blood was always looked upon as a peculiar hardship; and therefore in most, if not all of the new felonies created by act of parliament, since the reign of king Henry VIII., it is declared that they shall not extend to corruption of blood. And by a statute made in the reign of queen Anne, it was enacted that it should cease upon the extinction of the Stuart family. It has, however, been revived by a modern act. But by the statute 54 George III., c. 145. corruption of blood is now confined to the crimes of 2 Comm. 256.

high treason, petit treason, and murder; and of abetting, procuring, or counselling the same.

Does not extend to intailed dignities.

§ 82. Although by the statute 26 Henry VIII. c. 13. estates tail in lands, tenements, and hereditaments are forfeited by attainder of high treason of the persons actually possessed of them; yet it has been long settled, that as to estates tail, such attainder does not create any corruption of blood. And it was resolved in lord Lumley's case, where there were grandfather, father and son, and the grandfather was tenant in tail of lands, and the father was attainted of high treason, and died in the lifetime of the grandfather, that the grandson should inherit the estate tail from the grandfather, notwithstanding the attainder of the father.

1 Hale P.C. 241.

3 Rep. 106.

§ 83. In consequence of this doctrine, it has been resolved by the house of lords, that a dignity in tail may be claimed by the son of an attainted father, who was never possessed of the dignity. For the son may claim from the person who first acquired the dignity, *per formam doni*, as heir male of his body, within the description of the gift. And that the attainder of a father, or other lineal or collateral ancestor, who was never possessed of the dignity, will not prevent the descent to his issue.

Dukedom of Atholl, Journ. v. xxx. 466. 469.

§ 84. John Murray presented a petition to his majesty, in 1764, stating that his grandfather John marquis of Atholl was by letters patent created duke of Atholl, to him and the heirs male of his body.

That the said John duke of Atholl died in 1725, leaving James his eldest son, who succeeded to the title, and George, his second son, who was the petitioner's father.

That the said George was, in the year 1745, attainted of high treason by act of parliament, and died in 1760, leaving the petitioner his eldest son.

That James, the second duke of Atholl died in 1764, without leaving any issue male.

That the petitioner had consulted many gentlemen learned in the law of England, particularly the honorable Mr. Charles Yorke, sir Fletcher Norton, and Mr. de Grey, whether the said attainder, under the circumstances of the case, could be

any bar to the petitioner's succeeding to the title upon the death of his said uncle, James duke of Athol. And the said gentlemen were unanimously of opinion, that as by the law of England in a like case, no objection could arise by the said attainder; and as by the statute 7 Ann, all persons attainted of treason in Scotland were liable to the same corruption of blood, pains, penalties and forfeitures, as persons convicted or attainted of high treason in England, the petitioner would be clearly entitled to succeed to the said honors.

The petitioner, therefore, prayed that proper directions should be given for having the petitioner's right declared and established.

The opinions referred to in the above petition were in the following words:

I am of opinion that the eldest son of lord George Murray will be entitled to succeed to the honors of the duke of Athol, limited to the late duke and the heirs male of his body. The rule of forfeiture and corruption of blood is by statute 7 Ann, the same in Scotland as in England: and it is clear by the law of England that a dignity in tail may be claimed, *per formam doni*, under the limitation in the letters patent, by a son surviving an attainted father, who never was tenant in tail in possession of such dignity. The son may claim in this case from the grandfather, the first purchaser of the honor, as heir male of his body, within the description of the grant; and though the descent of a dignity in fee simple may be impeded by the corruption of blood, in cases of felony or treason: yet as there is no corruption of blood in the course of succession to an estate tail, created either in lands or dignities, I am of opinion that the attainder of the late lord George Murray will not prejudice the descent of the honors of the duke of Athol to the issue male of lord George in the case which has happened of the death of the attainted person in the lifetime of the present duke.

C. YORKE, June 18. 1761.

By the laws of England, estates tail, and dignities in tail (for there is no difference between a dignity and an estate in this particular), may be claimed, according to the form and effect of the deeds, or letters patent, by which they were first

granted. And as Mr. Murray, upon the death of the present duke of Athol without issue male, will be heir male of the body of the first duke of Athol; so by the express limitation in the letters patent, he will be entitled to the dignity, unless the attainder of lord George Murray, his father, can prejudice or defeat his title, which I am of opinion it cannot: for lord George Murray never having been in possession of the dignity, could not forfeit it; and his attainder cannot affect his son's claim, for being now dead, though Mr. Murray his son, when the event happens, must derive his title, or to speak more accurately, his pedigree, through his father, yet he claims nothing from him; his right being founded upon the letters patent themselves, which granted the honors to the first duke. If this would be the case of an English dignity in tail, by the laws of England, of which I have not the least doubt, the same principles must in this instance govern in Scotland: for the statute 7 queen Ann has made the rule and consequences of forfeitures, and corruption of blood, the same in Scotland and England. I am therefore of opinion that the eldest son of the late lord George Murray will be entitled to succeed to the honors of the family, in case the present duke should die without issue male.

F. NORTON, Lincoln's Inn, April 7. 1763.

I am of opinion that the eldest son of lord George Murray will, upon the death of the present duke without issue male, be entitled to succeed to the honors granted in the manner above mentioned: without receiving any impediment from his father's attainder; for the corruption of blood and forfeitures consequently upon high treason in Scotland, are now the same as they are upon high treason in England; and by the law of England the eldest son of lord George might claim a dignity or inheritance thus intailed, as heir male of the body of his grandfather, *per formam doni*, or the express limitation in the letters patent, the death of his father, before the possession of the dignity accrued, leaving him at liberty to convey a descent through him, by way of pedigree, though he could not do it by way of title.

WILLIAM DE GREY, December 23. 1763.

This petition having been referred by his majesty to the house of peers, it was resolved, after hearing the attorney general, that the petitioner had a right to the titles, honors and dignities claimed by his petition.

§ 85. In the above case the person attainted died in the lifetime of the ancestor who was possessed of the dignity; but in the following case the person attainted, having survived the ancestor who was possessed of the dignity, it was resolved, in conformity to the opinion of all the judges, that the dignity was lost; and could not be claimed by any collateral relation of the person attainted.

Airlie earldom. Printed case.

§ 86. Walter Ogilvy claimed the earldom of Airlie in 1812, stating that by letters patent under the great seal of Scotland, 1639, James Ogilvy, then lord Ogilvy, was created earl of Airlie and lord Ogilvy of Alith and Lintrathen; to him and his heirs male, succeeding to him in his patrimony and estate which consisted of the barony of Lintrathen, and some other hereditaments.

That the title descended to David earl of Airlie, who had two sons, James, the eldest, called lord Ogilvy, and John. James was attainted of high treason in 1715, and survived his father; but died without issue about the year 1730. That by the death of James without issue male, it was apprehended that the dignity did of right descend to John, his younger brother, who did not, however, assume the title from a mistaken notion, then prevalent in Scotland, that it was lost, by the attainder of his brother. He was, however, completely vested in, and possessed the family estates.

That the said John Ogilvy had two sons, David his eldest son, and the claimant, Walter his second son. And the said David was attainted of high treason in 1746.

That the said David Ogilvy, after remaining abroad for several years, having received his majesty's pardon, returned to his country: and in the 23d year of his majesty's reign, an act of parliament was passed, removing some of the incapacities and disabilities occasioned by his attainder. That the claimant, his younger brother, to whom the family estates

had been conveyed by their father, transferred them to his said elder brother, and the heirs male of his body, whom failing, to the claimant himself and the heirs male of his body. And thereafter a charter under the Union seal, of the barony of Lintrathen, and estate of Airlie, passed in favor of the said David Ogilvy. That the said David Ogilvy died in the year 1803, leaving an only son, who died a bachelor in 1812, and thereupon the estates and representation of the family devolved upon the claimant.

The case was heard before the committee of privileges, and the lords conceiving that a question of English law arose, as to the effect of the two persons attainted having survived their ancestors, the attorney general was desired to attend and state his objections to the claim. The attorney general admitted that the petitioner had clearly established his pedigree, as grandson to David, third earl of Airlie, who survived the Union, by John Ogilvy his second son; and that the petitioner's right to the earldom would be indubitable, if it were not for the attainder of his uncle James in 1715, and of his brother David in 1746.

The only material fact upon which any question could arise was, that the attainted person survived the ancestor in whom the title vested at the time of the attainder, which was the same in both; for James lord Ogilvy, who was attainted in 1715, survived his father David, third earl of Airlie, and died in 1730, and the claimant's brother David, who was attainted in 1746, survived his father John, and died in 1803.

By the 7th of Ann the penalties and forfeitures incident to treason committed in Scotland, are made conformable to those which exist in England; and the validity of the petitioner's claim must be argued as a question of English law. There was no doubt that unless a title of dignity granted in tail was protected by the statute *de donis*, the petitioner could have no right to this dignity; for in that case the title and the earldom of Airlie would have been a conditional fee in David the third earl; and the blood of his eldest son James being corrupted by the attainder, the title would thereby become escheated to,

or extinguished in the crown, in the same manner as if the dignity had been enjoyed in fee-simple; for no descendant could derive title to it through the attainted blood.

If it were open to him to argue whether the statute *de donis* extended to limitations in tail of titles of honor, there were strong grounds to contend that this act was neither intended, nor did in effect include them; for the object of the act was to prevent alienations, and consequently could not in sound construction be considered as comprehending, under the general word *tenementum*, dignities, which are personally inherent in the blood of the person first ennobled; are incapable of alienation; and differ in some important rules of descent from those which regulate the descent of lands, as well as other incorporeal hereditaments. But although he might feel himself able to cope with the reasoning upon which the decision of Neville's case, 7 Co. 3. is supposed to rest, he did not consider himself entitled to contest its authority, confirmed as it seemed to have been by the case of the duke of Athol, in the case of treason; and of earl Ferrers, in the case of attainder for felony. Ante.

Taking it for granted, therefore, that the estate tail in this dignity was within the meaning and protection of the statute *de donis*, the question was whether it was removed from the operation of that protection by 26 Henry VIII. c. 13. by which estates in tail, in use or possession, were forfeited by attainder for treason. It was contended by the petitioner's counsel, that neither James nor David Ogilvy were in possession of the dignities in question at the time of their respective attainders; and consequently that the dignity was not within the operation of the statute. Omitting the question arising from both these attainted persons having survived the ancestor, one of whom actually did possess, and the other of whom was supposed to have the dignity vested in him at the time of the attainders; he would consider the case as it stood, free from that most material circumstance. The claimant's counsel not only relied upon some decisions cited in respect to dignities, but likewise upon the determination in Lumley's case, which was thus. A grandfather, father, and son; the 3 Rep. 10a.

father is attainted of treason and dies, then the grandfather dies, the son shall inherit from him, because his father, who was attainted, had nothing in the land. He admitted the authority of that case in its full extent: he likewise confessed the authority of Gordon's case, which was no more than this, in effect, that a distinct remainder over in tail, to the second son of the settler, was not forfeited by the attainder of the eldest son, who was prior tenant in tail under the same settlement. But in these cases the estate tail was created by a subject; and he took the law to be quite different in a case which more nearly resembled the present, if it were not in terms the same, that is, where the grant of an estate tail is made by the crown, with the immediate reversion in the king, in other words, without the intervention of a remainder in a third person. In such case the king was in, by reverter to his original title, and had not a base fee, dependent upon the continuance of the grantee's issue; as he would if the intail had been created by a subject. If it were not for the decision in the case of the dukedom of Athol, he would feel considerable confidence in supporting this distinction, as subversive of the claimant's title. That case was so far in point as to dignities, that he could not rely as strongly upon a distinction which seemed to be thereby impugned, as he otherwise should. But he would content himself with observing, that in none of the opinions referred to in the petition, and upon which that claim seemed to have been originally made, was this distinction noticed; though fully stated by lord Hobart in Sheffield v. Ratcliffe. They all proceed on the ground that the statute 26 Henry VIII. operates upon estates tail in all cases by forfeiture, and not by corruption of blood; and pass unnoticed that distinction laid down by lord Hobart in Sheffield v. Ratcliffe, with respect to estates tail, where the reversion or remainder was in a subject; and where it was in the crown. "It is plain (says that learned judge) that a tenant in tail with reversion in the crown, if he be attainted, his blood is corrupted, and his estate tail ceaseth upon his death, and the land reverteth to the king in possession."

Foster, Crown Law, 95.

Hob. R. 345.

Before he cited the authorities upon which he relied as

establishing this proposition, he should state the principle upon which the distinction turned, which was that the 26 Henry VIII. was not to be construed as a penal law, but as a law introduced for the benefit of the crown, and as a remedial law, for the discouragement of treason. Therefore when an estate in fee tail was created by a subject, the statute should not operate to corrupt the blood of the tenant in tail by attainder; but to vest his estate as a base fee in his majesty, because it would, by corrupting the blood, destroy the intail, and give it to the person in remainder or reversion. But when the estate tail was created by the crown, and the immediate reversion was vested there, the attainder operated to corrupt the blood, and thereby to defeat the estate tail, and thus give an immediate effect to the reversion, placing the king at once, in, as of his original estate; instead of vesting in his majesty a base fee, with a reversion expectant thereon.

Upon whatever subtile modes of reasoning, or notions of prerogative, this distinction rested, it was settled in the books, and was fully commented upon, and clearly explained by lord Hobart in his elaborate judgment in the case of Sheffield v. Ratcliffe, which referred to all the authorities on the subject, with the exception of the Queen v. Hussey, in which the same position was recognized as law. If, therefore, the operation of the statute was to corrupt the blood, wherever the reversion was in the crown, all such estates were put out of the protection of the statute *de donis;* and were extinguished by attainder for treason, in the same manner as a base fee would have been previous to that statute.

Cro. Eliz. 519.

But if it was said that there was a distinction between the case of a dignity created by the crown, in tail, and lands granted by his majesty, he answered, that this argument could not well be urged, when the protection of the statute *de donis*, sought for this kind of estate, was founded in the notion mentioned by lord Coke in Neville's case, that titles were annexed to territorial possessions; and more especially as Lumley's case, the authority upon which they mainly relied, respected an estate in land.

It was further to be observed, that, in the present case, the

title was something in the nature of an estate tail conditional; for the title was limited to the first earl and his heirs male, succeeding him in his patrimony and estate. Something like the grant by Henry VI. to John Talbot, lord of the manor of Kingston Lisle, that he and his heirs, lords of the said manor, should be peers of the realm, by the title of barons Lisle. John Talbot had a base or qualified fee in that dignity; and the instant he or his heirs quitted the seignory of this
Co.Lit.21. manor, the dignity was at an end. So in this case, if the patrimony and estate of the first earl of Airlie had been granted in tail by the crown, it would have been forfeited under the authorities cited, and the dignity must have fallen with it; as the descendants would no longer fulfil the condition annexed to the enjoyment, of succeeding to the patrimony and inheritance. In that case, therefore, the rule of law regulating the forfeiture of the title and the estate, must be the same.

But supposing the claimant's counsel to be right in contending that a dignity which has never vested in the heir in tail, previous to his attainder and death, is not subject to forfeiture, and that the heir shall succeed to it; the next point is whether, if the presumptive heir, though attainted before the death of the tenant in possession, does in fact survive him, the estate is forfeited under the words of the statute: — "Shall lose and forfeit to the king, his heirs and successors, all such lands, tenements, and hereditaments which any such offender shall have of any estate of inheritance in use or possession by any right, title, or means, &c. at the time of any treason committed, or at any time after."

It was contended on the other side, that the words "at any time after," refer to the time of the attainder, which they consider as a civil death; and that it does not extend to such estates as open to him, after the attainder. This act, as was already observed, was made for the benefit of the crown, and is remedial, being designed to intimidate traitors, and to suppress treason. These objects are most effectually provided for, by preventing the succession of other members of the family, by means of collateral limitations. The words, "at any

time hereafter" were sufficiently extensive to cover all cases of descent which occurred, as well after the attainder, as between that period and the commission of the treason; they were entitled therefore to that construction, which should suppress the mischief, and advance the remedy. But it had been argued that an attainted person was incapable of taking the estate for the purpose of inheritance or enjoyment, and consequently that he had nothing subsequent to the attainder, which could be the subject of forfeiture. Co. Lit. 13. a. and Croke, Car. 477. had been cited as authorities for that proposition. But in opposition to this doctrine, he might observe, that in lord Hale's note on the passage in Co. Lit. as stated by Mr. Hargrave. It is laid down:—If A. enfeoffs B. attainted of treason, to the use of C. the king shall have the land, discharged of the use. And Pimb's case is cited from Moore, 196. However true this law may be, as to estates in fee simple, he doubted much whether it was correct as to estates tail. By the statute *de donis*, the blood of an attainted tenant in tail was so far preserved from corruption, that the estate was transmissible through him to the next heir, and he had thus a capacity secured to him of taking to that extent. But 26 Henry VIII. did not, according to the argument of the claimant's counsel, corrupt the blood, but rather prevented that corruption which would be the result of an attainder, by the common law, in order to preserve the estate tail, for the benefit of the crown, so long at the attainted person had issue; and for those in remainder, where a remainder existed. If therefore he was to be considered as so far capable of taking the inheritance, as to transmit it to the next heir, previous to 26 Henry VIII., that act could not be said to take away a capacity, which it was for the benefit of the crown to preserve, more especially when the words were sufficiently general, not only to admit of such a construction, but to require one more consonant to the spirit and meaning of the legislature.

He should beg leave to call the attention of the lords to those precedents which had been cited in support of the argument upon this part of the claimant's case; as it seemed

to him they differed from the present in the material circumstance upon which he had just relied, namely, that the attainted heir did not, in any of them, survive the tenant in tail.

Thus in the duke of Athol's case it appeared from the petition presented by John Murray, that his father George Murray, who was attainted, died in 1760, while his uncle duke John, to whom he claimed to succeed, survived till the 8th January, 1764.

Lord Bolingbroke's case, which was relied on, and contended by the petitioner to be in point, seemed to admit of a distinction not less material. In that case a remainder was limited to the father, lord viscount St. John, in tail male, upon failure of the estate in tail male, previously limited to his son Henry, the first lord Bolingbroke. This could only take effect in possession upon the death of Henry the son, without issue male. The very nature and object of the grant was, to postpone the father, and the heirs male of his body, to his son Henry and the heirs male of his body. The remainder to the father could not take effect until the preceding limitation to the son was gone and spent. During the son's life, his estate tail in the dignity was divested out of him by the attainder; but it was in existence, and vested in the crown by forfeiture; and it seemed very difficult to conceive how the father's remainder could descend, upon the father's death, to his son; when by the very nature and terms of the creation, neither he nor his issue could by possibility enjoy the dignity. He contended, therefore, that, in the true spirit and meaning of the grant, he was excluded altogether from the succession, under the limitation. That it never did descend upon him, and that the next heir male to the father, lord viscount St. John, succeeded directly to the title, as heir to his father, pointed out by the limitation.

An objection similar in principle occurred in the marquis of Tullibardine's case, which he had not been able to meet with, except in Mr. Cruise's book. There, nothing could by the statute descend to the marquis, on his father's death; for it was expressly provided by the act, that the titles and estates

should descend to the second son James, and his issue, in such manner as if the marquis had not been attainted of treason, and had died without issue, in his father's lifetime.

He purposely forbore making any observations on the case and title of earl Wemys. It never had been before the house, and could not be considered as an authority. He forbore to point out such distinctions as might exist between that case and the present, lest any unskilfulness of his should bring into contest a title upon which no question then existed.

He concluded with submitting to the lords, that a title to the earldom of Airlie had not been made out by the petitioner.

In the next sessions the claimant presented the following additional case, which was prepared by the author of this work.

Questions of law of a most important nature having been raised in the arguing of this claim, the claimant humbly submits to your lordships the following reasons and observations in support of it. His majesty's attorney general has admitted the pedigree of the claimant, and that his right to the earldom of Airlie would be indubitable, if it were not for the attainders of 1715 and 1746; but has contended, first, that a modern dignity is not within the statute *de donis conditionalibus*, and therefore cannot be intailed. And secondly, that even if the estate in the dignity claimed were an estate tail, the attainder for high treason of James, commonly called lord Ogilvy, in 1715, and the circumstance of his having survived his father; and the attainder of David, commonly called lord Ogilvy, in 1746, and his also having survived his father, created a forfeiture of the earldom.

With respect to the first of these objections, the question whether a dignity was intailable within the statute *de donis* was propounded by order of king James I., to all the judges in Neville's case, reported in 7 Coke 34., who were unanimously of opinion that the dignity then claimed, which was the earldom of Westmoreland, created in 21 Richard II. was within the statute. It is, however, admitted, that the principle on

which the judges founded their opinion in that case was, that the earldom of Westmoreland concerned lands. Lord Coke, however, who argued Neville's case, as attorney general, and in whose time dignities had ceased to be territorial, but were created with reference to some castle, manor, or particular estate, states the law, in his Commentary on Littleton,
12 Rep. 81. 1 Inst. 20. a. in the following words: — "Also a name of dignity may be entailed within the statute; as dukes, marquisses, earls, viscounts, barons; because they be named of some countie, manor, towne, or place."

It has never since been doubted but that modern dignities created of a particular place are within the statute *de donis*, and not conditional fees. For notwithstanding the alteration which has taken place in the nature of dignities, no alteration has been made in the rules by which they have been governed; but the fiction of law by which they are considered as real hereditaments, has been preserved, and resorted to in all the reasonings and decisions on them.

Ante. Lord Holt was of opinion that there was no necessity, in the creation of a dignity, to name it of a particular place; and some modern dignities have been created which are named of places out of the kingdom; it would, therefore, be extremely dangerous to the peerage to allow of any distinction between those dignities which have been created with reference to a particular place in England, and those in which that circumstance is omitted; nor is there any reason to suppose that the crown, in the creation of modern dignities, ever meant to make any such distinction. In the two following cases, the house of lords held that a modern dignity, granted by letters patent, to a person and the heirs male of his body, was within the statute *de donis*, and that the grantee took an estate in tail male in the dignity.

The dukedom of Athol was conferred in 1703, on John marquis of Athol and the heirs male of his body, a claim was made to this dignity in 1764, by his grandson, whose father had been attainted of high treason; and upon great consideration, it was held that the first grantee of the dukedom took an estate tail in it, within the statute *de donis*; for

otherwise, as will be shown hereafter, the claimant could have no title, and the dignity is now enjoyed under that decision.

Lawrence earl Ferrers, to whose ancestor the dignity was granted in 1711, to him and the heirs male of his body, was convicted and executed for felony in 1760. The house of lords held that the corruption of blood did not operate so as to prevent the next brother's taking his seat as earl Ferrars, a short time after the execution of the former lord; and the dignity is now enjoyed accordingly. Ante. Journ. vol. xxix. pa. 690.

The house must have proceeded in this case upon the principle laid down by lord Coke, "That as to felonies, the statute *de donis* remains in force, so as for attainder for felony, lands and tenements intailed are not forfeited," and therefore that the dignity, not being intailed, descended to the brother; for if the estate in the dignity had been a conditional fee, it would have been forfeited. 1 Inst. 392. b. Vide ante.

Thus it fully appears that dignities, whether ancient or modern, have been uniformly held to be within the statute *de donis*, and a grant of a dignity to a person and the heirs male of his body, has been considered as creating an estate in tail male. The titles of some of those noble persons who now sit in the house of peers depend upon this doctrine, and therefore to question it now, and to establish that dignities of this kind are conditional fees, and subject to forfeiture for felony, and also to corruption of blood, would be extremely dangerous to the peerage.

Mr. Attorney general contended that in consequence of these words in the patent; *Concedimus prædicto Jacobo domino Ogilvy suisque hæredibus masculis, sibi in patrimonio et statu succedentibus, &c.* the earldom of Airlie partook somewhat of the nature of a qualified fee, as described by lord Coke in the case of Talbot lord of Kingston Lisle; but the words cited from the patent do not appear sufficient to create such an estate. In the case of Talbot lord Lisle, the dignity was annexed to the manor of Kingston Lisle in Berkshire, which was a baronial estate, to the possession of which the dignity of a baron was annexed, and therefore the alienation of the manor would be followed by the loss of the dignity. But in 1 Inst. 27. a.

this case an alienation of the *patrimonium*, or of any part of it, would, upon the attorney general's construction, destroy the dignity; which never could have been the meaning of the letters patent. The word *patrimonium* is much too general to warrant such a conclusion.

With respect to the second question, admitting the earldom of Airlie to be an intailed dignity within the statute *de donis*, or of a similar nature, the case must be considered as if it arose on a claim to an English dignity of the same kind; and depends on the nature of an estate tail, and the construction of the statute 26 Henry VIII. c. 13. It being enacted by the statute 7 Ann c. 21. § 3., "That all persons convicted or attainted of high treason, or misprision of treason, in Scotland, shall be subject and liable to the same corruption of blood, pains, penalties, and forfeitures, as persons convicted or attainted of high treason or misprision of treason in England."

In consequence of the statute *de donis*, those estates that were conditional fees at common law, became estates tail, and were protected from forfeiture for high treason, except during the life of the offender, and also from corruption of blood. Thus Littleton, § 747. after stating that where a man is attainted or outlawed for felony, his blood is corrupted, proceeds in these words: — "But the issue in tail, as to tenements tailed, is not, in such case, barred; because he is inheritable by force of the statute, and not by course of common law; and, therefore, such attainder of his father, or of his ancestor in tail, shall not put him out of his right, by force of the tail," &c. Thus stood the law till the statute, 26 Henry VIII. c. 13., by which it was enacted, that every person, convicted of high treason, "shall lose and forfeit such lands, tenements, and hereditaments, which any such offender or offenders shall *have*, of any estate of inheritance, in use or possession, by any right, title, or means, at the time of any such treason committed, or at any time after, saving to every person and persons, their heirs and successors, (other than the offenders in any treason, their heirs and successors), all such rights, titles, &c., which they shall have at the day of the committing such treasons, or at any time afore." Under

1 Inst. 392. b.

Plowd. 237.

the general words of this statute, estates tail became forfeitable for treason; but it was laid down by the Court of Exchequer in Dowtie's case, reported by lord Coke, "that neither the act nor the attainder makes any corruption of blood as to the descent of land in tail; for Popham, attorney general, said, that so it was agreed in the case of Lord Lumley, that where there was grandfather, father, and son, and the grandfather was tenant in tail, and the father was attainted of high treason, and died in the life of the grandfather, and afterwards the grandfather died, that the land should descend to the son, notwithstanding the attainder of the father; which case was affirmed for good law by the whole court. For the father *had* not the land neither in possession nor in use, in which two cases the act of 26 Henry VIII. gave the forfeiture only, and his attainder is not any corruption of blood for the land entailed." 3 Rep. 10.

The same point was determined by the court of Exchequer in the case of Mantel *v.* Mantel, and was admitted to be good law in 3 James I. by the two chief justices, the chief baron, and the court of wards in Digby's case. Cro. Eliz. 28. 8 Rep. 166. a.

In that very able tract entitled, Considerations on the Law of Forfeiture, written by the honorable Charles Yorke, the author, after stating lord Lumley's case, proceeds in these words: "The reason is obvious, because the issue in tail claims *per formam doni*, that is, he is as much within the view and intention of the gift or settlement, and as personally and precisely described in it, as his ancestor. But this is not all, the forfeiture of estates tail came in by the construction of the statute 26 Henry VIII. The judges resolved, that the general words of that statute comprehended these estates. But then such laws being of a *penal* kind, though they are to be construed so as to attain their full effect, yet they are to be construed *strictly*; and, however they might extend to make estates tail liable to forfeiture where they are actually in the offender's possession, and consequently in his power to alienate, they could not, by any rule of construction, be extended to bring consequential disabilities on the heir, where the estates have not been in the offender's possession."

It follows, that in all cases of claims by an issue in tail, to lands intailed, a pedigree may be deduced through an attainted person. And in the case of lord Lumley, the grandson must have been allowed to deduce his pedigree through his father, though his father was attainted of high treason.

Mr. Attorney general has contended, that where the grant of an estate tail is made by the crown, with the immediate reversion in the crown, the king, in case of attainder of the tenant in tail, is in by reverter to his original title; the blood of the tenant in tail being corrupted, and has not a base fee dependent upon the continuance of the grantee's issue. In support of which, he has cited the following *dictum* of lord chief justice Hobart, in the case of Sheffield *v.* Ratcliffe. Hob. 345. "For it is plain that tenant in tail, with reversion in fee in the crown, if he be attainted, his blood is corrupted, and his estate tail ceaseth upon his death, and the land reverteth to the king in possession."

It will be necessary to state the legal principles upon which this assertion is founded. In the case of an estate tail, with the remainder or reversion in a subject, as the attainder of the tenant in tail cannot affect the person in remainder or reversion, the estate becomes forfeited to the crown during the life of the tenant in tail by the enacting part of the statute, and also remains in the crown during the existence of any issue of the tenant in tail by the saving, out of which the heirs of the offender are excluded; so that the crown, in that case, acquires a base fee, as long as there are any heirs of the body of the tenant in tail. Thus it is said in Plowden, 557. "If a man at this day makes a gift in tail, and the donee is attainted of treason, the queen and her heirs shall have the lands as long there are any heirs of the body of the donee."

But in the case where the immediate reversion in fee is in the crown, it was contended, but not resolved, in Walsingham's case, reported by Plowden, 559. that the crown should have the land by way of reverter, and not by way of forfeiture. In that case, the tenant in tail, previous to his attainder, had made a feoffment in fee; and the real question was, whether that feoffment operated as a discontinuance; for if it did, the

forfeiture would have been saved, as will be shown hereafter. The same question again arose in the case of Stone *v.* Newman, and was repeatedly argued in the exchequer chamber by all the judges, where it was resolved, that the right of the estate tail was forfeited, because the feoffment could not operate as a discontinuance, the reversion always remaining in the crown. Cro. Car. 427.

Mr. Attorney general has contended, that these decisions justify the *dictum* of lord Hobart, that the statute 26 Henry VIII. which creates a forfeiture of estates tail, is a remedial and not a penal law. That where the reversion is in the crown, the blood of the tenant in tail is corrupted; but where there is a remainder or reversion in a subject, the blood is not corrupted, because such a construction would operate to destroy the estate tail, and deprive the crown of the forfeiture; for in that case, the estate would go to the person in remainder or reversion.

This exposition of the statute is perfectly new. The first part of it rests solely on the authority of lord Hobart; but it is observable, that nothing similar to the *dictum* of that learned judge is elsewhere to be found. It is true, that where a tenant in tail, with the immediate reversion in the crown, is attainted of high treason, he forfeits his estate, not only for his own life, but also during the existence of any issue of his body, because the issue are excluded by the saving. It does not, however, follow that his blood is corrupted, that would be directly contrary to all the resolutions on the statute. Lord Hobart's zeal for the crown, and indignation against the traitor, by which he candidly acknowledges himself to have been moved, in pronouncing that judgment, instigated him to go somewhat too far in advancing an extra-judicial opinion, not warranted by the authorities he has cited, nor admitted by any subsequent writer. For neither lord Hale, nor serjeant Hawkins, who have given very able expositions of this statute, and also of Walsingham's case, and that of Stone *v.* Newnham, have adopted, or even noticed lord Hobart's *dictum*; but have distinctly stated, that in both the cases above mentioned, the crown acquired the estate by forfeiture. Hob. Rep. 335. Hale, P.C. vol. i. 242. Hawk. B. ii. c. 49. § 18 & 24.

The second part of Mr. Attorney general's exposition of the statute is equally unfounded. For where there is a remainder or reversion in a subject, the statute, as has been already stated, vests the estate in the crown during the life of the tenant in tail, under the enacting clause, and bars the issue by excluding them from the benefit of the savings, so as to vest a base fee in the crown, even if the blood were corrupted; for such corruption of blood would disable the issue in tail from inheriting, and the person in remainder could not take, as long as there was issue of the tenant in tail; consequently, the crown would be entitled to hold the estate during that period.

But admitting the *dictum* of lord Hobart to be good law, still it would not affect the present case, for it does not contravene the doctrine established ever since the statute 26 Henry VIII. was made, and which will be stated hereafter, that a person must actually have an estate tail, to be capable of forfeiting it under that act, and here neither of the persons attainted ever had any estate in the dignity claimed. Nor the doctrine established in lord Lumley's case, that the attainder of the heir in tail is not attended with corruption of blood, *quoad* the estate tail.

Mr. Attorney general has contended that if the presumptive heir, though attainted before the death of the tenant in possession, does in fact survive him, the estate is forfeited, because the statute 26 Henry VIII. being made for the benefit of the crown, and remedial, the words "or at any time after," are sufficiently extensive to cover all cases of descent which occur, as well after the attainder, as between that period and the commission of the treason. To this argument a full answer may be given. For 1°. A tenant in tail can only forfeit what he has. 2°. A person attainted cannot take an estate tail by descent, and consequently cannot have it to forfeit.

With respect to the first of these propositions, the statute 26 Henry VIII. has, down to the present time, been construed so strictly, that the tenant in tail must actually *have* the estate tail, in order to be capable of forfeiting it. Thus it has been decided that where a tenant in tail, with the reversion in a sub-

ject, made a feoffment in fee of his estate, and afterwards was attainted of treason, the feoffment operated as a discontinuance, and the offender not having the estate tail in him at the time of the attainder, there was no forfeiture. 3Rep. 2. 6 Cro. Car. 428.

Where the immediate reversion was in the crown, there was no discontinuance of the estate tail, and therefore it was not forfeited, as has been already mentioned.

The principle of these decisions is, that a right of entry is forfeited to the crown under the statute 26 Henry VIII., but not a right of action. Now, where the tenant in tail, with remainder to a subject, discontinues his estate, his issue has only a right of action, which is not forfeited. But where the immediate reversion is in the crown, the tenant in tail cannot create a discontinuance; so that a right of entry remains in the issue, which is forfeited to the crown. 1Inst. 335. a.

Judge Jenkins states, that where a tenant in tail discontinued, and the discontinuee made him a lease for his life, and afterwards he was attainted, the estate tail was not forfeited; for, says he, in this case at the time of the treason, he had not any estate to forfeit, as the said statute of 26 Henry VIII. requires. Cent. 7. Ca. 21.

Thus it appears that unless the tenant in tail actually has the estate in him, there is no forfeiture. And lord Coke states the effect of the statute in these words;—"If tenant in tail in possession, or that hath a right of entry, be attainted of high treason, the estate tail is barred, and the land is forfeited to the king." 1 Inst. 372. b.

With respect to the second proposition, it will not be necessary to cite many authorities to prove that a person attainted cannot take any estate by descent. That of lord Coke will be quite sufficient.—"If a man be attainted of treason or felony, although he be born within wedlock, he can be heir to no man." 1 Inst. 8. a.

This doctrine applies equally to an heir in tail, who was incapable, as well before the statute 26 Henry VIII. as since, of taking an estate tail by descent. This is clear upon principle, because the disability created by an attainder is general; and is also confirmed by the following authorities, in which it

is said that where the issue in tail is attainted of felony, he cannot take the estate tail by descent; but it either vests in the crown, or becomes the property of the first occupant, during the life of the attainted person.

B. Pla. 5. Tit. Forfeiture, pla. 37.

In Viner's Ab. tit. Blood corrupted is the following translation of a passage from Brooke's Ab.: — "Where the issue in tail is outlawed of felony, in the life of the ancestor, and gets a pardon in the life of the ancestor, he may enter after the death of his ancestor, as heir in tail, *contra* of fee simple. But if the ancestor dies before the pardon, then it seems by Thorpe that the heir in tail cannot enter. The reason seems to be, inasmuch as the king shall have the land during the life of the outlaw.

Tit. Descent, pla. 23. 29. Assises, pla. 61.

The same doctrine is laid down by Brooke, and appears to be deduced from a case in the Year books, which is thus stated and reasoned upon by Plowden, 557-8. "Tenant in tail was bound in a statute merchant, and the issue was outlawed for felony, and obtained a charter of pardon in the life of the father. The father died, the issue entered, the conusee sued execution of the land, and the heir brought an assise; whether or no the assise was maintainable was there debated. The principal point argued was, what estate the issue had; for if he had an estate tail, then the assise was maintainable, for then he was remitted to his estate tail, in which case execution could not be issued against him; and if the issue had a fee simple, or any other estate than an estate tail, then the assise was not maintainable. And there it appears that the outlawry for felony so disabled him in blood, that he could not take by descent the land in tail, any more than the land in fee simple, notwithstanding the charter of pardon, which could not restore his blood to its former purity. From whence it follows that when his father died, the land could not revert to the donor, because the donee had issue, *and the issue could not take by descent, by reason of his disability;* so, that upon the death of the father, the freehold in deed or in law was in none, but in *nubibus;* as it is where tenant *pur auter vie* dies in the life of the *cestui que vie*, and none enters, in which case every man in the world has an equal title to the

land; and therefore when the issue in tail entered, he was but an occupant.

In a note of lord Hales, published by Mr. Hargrave, the doctrine of the case in 29. Assise, is thus stated: — "The issue in tail attainted, *in vita patris*, after the death of the father the donor cannot enter, but the issue, if pardoned, may enter, and hold as special occupant, subject to the charges of the father." 1 Inst. 22. a. n. 3.

Thus it appears that at common law the issue in tail, if attainted of felony, and *a fortiori*, if attainted of high treason, is incapable of taking the estate tail by descent; and there is surely nothing in the statute 26 Henry VIII. to enable him to inherit. Before that statute, if a tenant in tail was attainted of treason, the estate tail was forfeited to the crown during the life of the tenant in tail, but upon his death his issue became entitled to it. "Where tenant in tail is attainted of treason before the statute 26 Henry VIII. his son shall have the land; for he does not claim only as heir, but by the statute, *et per formam doni*." Now as the only object of that statute was to destroy the descent to the issue of an attainted person, it is impossible to construe it so as to give an attainted issue a capacity of inheriting which he had not before. Vin. Ab. Tit. Forfeiture, c. pla. 4. Bro. Ab. Tit. Nosma pl. 1.

Mr. Attorney general advanced a singular argument as to this point. He said that as an attainted person was so far capable of taking the inheritance as to transmit it to the next heir, previous to the statute 26 Henry VIII., that act cannot be said to take away a capacity which it is for the benefit of the crown to preserve; more especially where the words are sufficiently general. A proposition is here assumed which is not law, for it has been shown that a person attainted was incapable of taking an estate tail by descent, before or since the statute 26 Henry VIII. The capacity of taking by descent is here confounded with, or deduced from, the capacity of transmitting, though perfectly different. It is true that the issue in tail, though attainted, may be the means of transmitting an estate tail, because as his blood is not corrupted, *quoad* an estate tail, a title may be deduced through him; but that does not give him the power of taking the estate tail by descent. For

corruption of blood, as Mr. Yorke properly describes it, is a consequential disability, which affects the heirs of an attainted person, but does not affect himself: a person attainted is equally incapable of inheriting, whether his blood be corrupted or not; the only difference is, that where his blood is not corrupted, a pedigree may be deduced through him, where his blood is corrupted, it cannot.

In the case of an estate in fee simple, the attainder of the heir apparent does not create a forfeiture of the estate, because a person can only forfeit what he has. Upon the death of the ancestor, the estate will escheat to the lord of the fee, because the heir cannot take by descent, on account of his attainder, and his blood being corrupted, no other person can derive a title through him. If the king be lord he will take by escheat, not by forfeiture. If the land be held of a mesne lord, it will escheat to him. "The father is seised of lands in fee simple, holden of J. S. The son is attainted of high treason, the father dieth, the lands shall escheat to J. S. *propter defectum sanguinis*, for that the father died without heir; and the king cannot have the land, because the son never had any thing to forfeit."

1 Inst. 13. a.

In the case of estates tail, there can be no escheats, for escheats are only of the fee simple. The attainder of the heir disables him from taking during his life, but his blood not being corrupted, the next heir, though lineal, may after his death derive a title to the estate through him.

Fitz. N. B. 143.

The reason of inserting the words, "or any time after," in the statute 26 Henry VIII. will plainly appear, upon an examination of the law of forfeiture, in cases of fee simple estates, and the object of the legislature in making the statute 26 Henry VIII. lord Hale says, "The relation of the forfeiture or escheat of lands, for treason or felony, to avoid all mesne incumbrances, is to the time of the offence committed." If this were not the law, a person indicted for treason might, on the eve of his trial, convey all his real estates to his children, and thus deprive the crown of the forfeiture. It is therefore settled that all real property whereof a person is seised at the time of the offence committed, or at

P. C. vol. i. 360.

any time after, down to the attainder, becomes forfeited to the crown.

As to any lands acquired after the attainder, they also become the property of the king, upon another principle, namely, that a person attainted of treason is civilly dead, and can only purchase for the benefit of the crown. Thus lord Coke says, "And if a man be attainted of felony, yet he hath capacity to purchase to him and his heirs, albeit he can have no heir; but he cannot hold it, for in that case the king shall have it by his prerogative, and not the lord of the fee; for a man attainted hath no capacity to purchase, being a man *civiliter mortuus*, but only for the benefit of the king." 1 Inst. 2. b.

It is the same where a person is attainted of treason. A person committed treason in 18 Elizabeth, for which he was attainted eight years after. Between the commission of the treason and the attainder, lands were conveyed to him, to certain uses. It was held by Plowden, Popham, and others, that the estate of the land was in the queen, because she was entitled to all lands that traitors had, at the time of the treason, or after. Now, as the framers of the statute 26 Henry VIII. must have been sensible that they were making a penal law, by creating a forfeiture, where there was none before; if they contented themselves with enacting that persons convicted of treason should forfeit all the lands and tenements which they had at the time of such treason committed, those words would not extend to lands acquired by purchase or descent, subsequent to the time when the treason was committed, and prior to the attainder. They therefore added the words, "or any time after," to take in the intermediate period; but these words can never be extended to the time after the attainder, because the attainted person becomes, by the attainder, incapable of taking by descent, and can only take by purchase, for the benefit of the crown. Pimb's case, Moo. Rep. 196

Mr. Attorney general began and ended his argument by observing that the present case differed from lord Lumley's, and that of the dukedom of Athol, in this material circumstance, namely, that in those cases the persons attainted died

in the lifetime of their ancestors, but in this the persons attainted survived their ancestors. He did not, however, cite any authority, neither an adjudged case, nor a *dictum*, or deduce any argument, either from principle or analogy to prove the importance of this difference, or that an estate in land, or a dignity, would be forfeited or destroyed by reason of such survivorship. Now, with respect to estates in land, it is laid down by lord Hobart, than an estate tail may cease for a time, and yet rise again, and may cease as to one person, and be in force and *esse* to another. Thus, where a tenant in tail dies, leaving his wife pregnant, the reversioner may enter; but upon the birth of a child, the estate tail will revive. And in the case already stated from Brooke, it is said by Thorpe, that the estate would vest in the crown, during the life of the outlaw only; and as the donor is excluded, the next issue must of course have succeeded to it, upon the death of the outlaw.

Hob. Rep. 257.

7 Rep. 8. b.

In Plowden it is said, *arguendo*, that the estate would go to the first occupant. This, however, appears to be an erroneous opinion. And in the case of Thornby *v.* Fleetwood, respecting the statute 1 James I., by which it was enacted, that if any person should pass or go, or send beyond sea any child to reside in a college of Jesuits, every such person so passing, or being sent beyond sea, should, as in respect to himself only, and not in respect of any of his heirs, or posterity, be disabled and made incapable to inherit, purchase, take, have, or enjoy any manors, lands, &c. Mr. Justice Powys is reported to have said, "But when the argument that the profits only are forfeited prevails, there arises a sub-point, who shall have the profits? I say, the king shall have them. 1°. Because he is concerned to see the law executed. 2°. There are goods in the case, as well as lands; and who can have them but the king. 3°. This is an offence of a public nature, *contra coronam et dignitatem suam*, and that makes the difference between the case of Woodward *v.* Fox, and the case of tithes, where private interest is concerned. 4°. Those will be derelict lands, which go to the crown, when there can be no owner found." If the acquisition of an

1 Stra. Rep. 374.

estate tail by the crown, before the statute 26 Henry VIII., in consequence of the attainder for treason of the tenant, did not destroy the estate, which appears to have been the case from the passage in Brooke already stated, why should the acquisition of an estate tail, by the crown, in consequence of the disability of the next heir in tail to inherit it, destroy the estate, and prevent its descent, upon the death of the person disabled, to the issue next inheritable under the intail? In the descent of estates in fee simple, the circumstance of the attainted person's surviving his ancestor, is of the utmost importance. Thus, lord Hale says, "If there be father and two sons, and the eldest is attainted in the life of the father, and dies without issue in the life of the father, the younger son shall inherit the father; for he need not mention his elder brother in the conveying of his title; but if the elder brother attaint survive the father but a day, and die without issue, the second son cannot inherit, but the land shall escheat, *pro defectu hæredis*: for the corruption of blood in the elder son, surviving the father, impedes the descent. As there is no corruption of blood in cases of intails, the time of the death of the person attainted is immaterial; for a title, or rather a pedigree, may be deduced through him, whether he died in the lifetime of the ancestor, or not. And it is observable that lord Hale confines the above case to descents of lands in fee simple.

P. C. vol. i. 356.

There are two cases of fines upon the statute 32 Henry VIII. c. 36., where the circumstance of the issue in tail surviving his ancestor is material; because where the estate tail never descended upon the person, the next collateral heir is not *privy* to him, within the words of that statute, or the statute 4 Henry VII., so that he may make out his title, without deducing his descent through him. And there are some cases of warranty in which the same circumstance is material; but they do not afford any analogy to the present case.

Mackwilliam's case, Hob. Rep. 332. Bradstock v. Scovell. Cro. Car. 434.

The doctrine contended for by Mr. Attorney general, that where the person attainted survives his ancestor, there is a forfeiture, is not to be found any where: and yet if the law

were so, it is extremely probable that either judge Jenkins, who has twice stated lord Lumley's case, or some one of the barons of the exchequer, who in Dowtie's case fully discussed the statute 26 Henry VIII., would have mentioned so important a point. Lord Hale in his pleas of the crown, professes to give a full account of the doctrine of forfeiture for high treason, to which he has dedicated a long chapter; he has twice stated lord Lumley's case, but is totally silent as to the consequence of an attainted issue in tail surviving his ancestor. Is it probable that if he thought that the circumstance of survivorship would create a forfeiture, he would have omitted to state it?

Pa. 82. 287.

Ch. 23. Vol. i. 241. 356.

Serjeant Hawkins is equally silent on this head; nor is this doctrine mentioned by Mr. Yorke in his considerations on the law of forfeiture, though lord Lumley's case is there stated. These negative authorities must appear quite conclusive, when it is considered that they are fully supported by principle.

With respect to dignities, the principles of law that have been stated apply as directly to them, as to estates in land; for it would be extremely dangerous to admit of any distinction. It may therefore be laid down.

1°. That though an estate tail in a dignity is forfeited by the attainder for treason of the person actually having it, according to Neville's case, yet that the attainder for treason of the eldest son of a tenant in tail of a dignity, in the lifetime of his father, does not create a forfeiture of the dignity; because such eldest son had it not to forfeit.

2°. That if such eldest son survives his father, the dignity does not, as to any purpose, descend on him; because his attainder disables him from taking a dignity by descent, as effectually as it disables him from taking lands intailed, by descent.

3°. That as no corruption of blood takes place in this case a title, or rather a pedigree, may be deduced through such attainted son, after his decease. In support of this proposition, the case of the dukedom of Athol is stated, and it is said that the house, in that case, acted upon the principle that a

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dignity in tail may be claimed, *per formam doni*, under a limitation in letters patent, by a son surviving an attainted father, who never was tenant in tail in possession of such dignity; there being no corruption of blood in the succession to an estate tail in lands or dignities.

4°. That during the life of such eldest son, the dignity becomes vested in the crown, or is suspended, or in abeyance, but is not destroyed; and therefore that after the death of the eldest son, the next heir in tail becomes entitled to such dignity.

The case of lord Bolingbroke is then stated; and it is said to be perfectly clear that the dignity, created by the special limitation, was a vested estate in sir Henry St. John, descendible to the heirs male of his body, and would have descended, on his death in 1742, to his eldest son Henry, if he had not been attainted. The position of the Attorney general, that under the remainder to sir Henry St. John and the heirs male of his body, his eldest son and his issue male were excluded, is perfectly untenable; for it is impossible to contend, upon any principle of construction, that under a limitation to A. and the heirs male of his body, the eldest son of A. can be excluded from taking, by any estate already limited to such eldest son. If an authority were wanting in so plain a case, the following passage from lord Coke is decisive:—"If a gift be made to the eldest son and to the heirs of his body, the remainder to the father and to the heirs of his body, the father dieth, the eldest son levieth a fine with proclamations, and dieth without issue; this shall bar the second son, for the remainder descended to the eldest." It follows that in consequence of the attainder of lord Bolingbroke, the dignity which had been limited to sir Henry St. John became, upon his death, suspended, or vested in the crown during the life of lord Bolingbroke, but upon his death it descended to his nephew. So that in this case, which it is presumed was fully considered, lord Hardwicke being then lord chancellor, and sir Dudley Ryder attorney general, the house of lords must have admitted that the circumstance of an attainted person's surviving his ancestor, from whom a dignity would have descended to him, as issue in tail, if not attainted, did not de-

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1 Inst. 372. a.

stroy the dignity, but only suspended it; and that on the death of the attainted person, it descended to the next issue inheritable to such dignity. Mr. Attorney general adverted to the private act, 1 Geo. I. c. 24., respecting the marquis of Tullibardine, who was attainted of high treason in the life-time of his father, John duke of Athol; but that act does not furnish any argument for or against the present claim; the object of it was to give to lord James Murray, the second son of the duke of Athol, the same right as he would have had if his elder brother had never existed. The words being, "that all the honors, titles, and estates of the said John duke of Athol should, from and after his death descend to the said James Murray and his issue, in such manner as the same would have descended in case the said marquis of Tullibardine had not been attainted of high treason, and had died without issue in the lifetime of the said duke of Athol. By this act lord James became entitled to succeed immediately to his father, whether his elder brother were alive or not, and did accordingly succeed to his father's honors in 1724, though his elder brother was then alive. But having no son, he obtained another act, 6 Geo. II. c. 14. to amend and explain the former act, by extending it to all the issue male and heirs of his father John duke of Athol, so as to render the honors of the family descendible to his brother's children.

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It is not, however, necessary in the present case to contend that where the heir in tail is attainted, and survives his ancestor, the son of such heir would, upon the death of his father, become entitled to the estate or dignity, *per formam doni*. For here the claimant is not lineally descended from either of the persons attainted. James lord Ogilvy, who was attainted in 1715, died without issue; and David lord Ogilvy, who was attainted in 1746, left an only son, who died without issue in 1812. So that the present claimant can deduce his pedigree from James, the first earl of Airlie, without claiming through either of the persons attainted.

The following question was put to the judges. Whether if lands were granted by the crown to A. B. and the heirs male of his body lawfully begotten, and A. B. had issue a son

named C. D.; and C. D. had also issue a son named E. F.; and C. D. in the lifetime of his father committed high treason, and it was by act of parliament enacted that he should stand and be adjudged attainted of the said high treason to all intents and purposes whatsoever, and should suffer and forfeit as a person attainted of high treason by the laws of the land ought to suffer and forfeit; and A. B. afterwards died in the lifetime of C. D., and C. D. the attainted person, then died, E. F. the son surviving, E. F. would be considered in the courts below, after the death of C. D. as entitled, under such grant, to the lands so granted?

Lord chief justice Gibbs delivered the opinion of the judges as follows:

We are of opinion that E. F. would not be considered in the courts of law, after the death of C. D. as entitled, under such grant, to the lands so granted.

It has been contended on the part of those who have argued for the interests of E. F. that his interest, in this case, is protected by the statute *de donis*, and is not within the peril of the 26 Henry VIII., and consequently is not forfeited to the crown. But we are of opinion that it is not, under the circumstances stated to us, protected by the statute *de donis;* and we are of opinion likewise, that if those who have argued for the claim of E. F. could persuade your lordships to adopt the principle upon which they have endeavoured to bring it within the statute *de donis*, they would by establishing that principle, bring it also within the operation of the 26 Henry VIII., and subject it to forfeiture, by the attainder of C. D.

It is quite clear that if the case put to us had occurred upon an estate in fee simple conditional, before the statute *de donis*, the land granted would have reverted to his majesty, as upon a failure of issue described in the grant; for the tenant in tail dying while the next issue in tail stood attainted of high treason, such issue could not have taken, because his blood was corrupted by the attainder, and the reversion would fall to the crown, for want of issue capable of inheriting under the grant. The king would then be in, by way of reverter, and being in by way of reverter, his title would be paramount to all charges

upon the estate tail. This would have been the case before the statute *de donis*, and we think that the statute has not altered it.

The statute *de donis* recites that donees in tail, after issue born, had been used to make alienations to the prejudice of the issue in tail, and also to the prejudice of the donor, and it enacts that such alienations shall not prejudice the issue, or the donor, or his heirs. This is all that the statute does. I know that it has received a very large construction, for the protection of the issue in tail; I know that a criminal act done by a tenant in tail, by which, upon attainder, he forfeits his estate, has been held to fall within the description of alienation in the statute, and therefore it is, that if a tenant in tail be attainted of high treason, and so the estate passes from him by forfeiture, the issue in tail is protected by the statute, as from an alienation by the tenant in tail; but that is not the present case. Here there is nothing done by the tenant in tail either to alien, forfeit, or otherwise put away his estate; nothing which can possibly be brought within the term *alien* in the statute, and therefore the case remains as at common law. The estate tail is extinguished, for want of issue capable of inheriting on the death of the tenant in tail: and the land reverts to the king, who has the reversion in fee, the grant having originally proceeded from the crown.

13 Edw. 1.

It has been argued very strongly by the counsel for the claimant that corruption of blood, as far as it regards the succession to estates tail, is wholly taken away by the statute *de donis*, and that this disability being removed E. F. must of course be entitled to take, under the protection of the statute. Whether corruption of blood be or be not taken away, must depend upon the language of the statute; and in some degree upon the decided cases. Now, upon looking into the statute itself, I find not a word to support such a proposition. It protects the interests of the issue in tail, in certain cases, and likewise the interest of the donor, and as far as such issue would have been prevented from taking before the statute by corruption of blood, so far in those cases the effect of corruption of blood is taken away in their favor. Where pro-

tection is given to the issue by the terms of the statute, corruption of blood does not prevent its taking full effect; it is incidentally removed in those cases, but in no others, and the statute has no further operation in taking away corruption of blood. The question always is, whether the interest of the issue in tail be, or be not, protected by the terms of the statute. Where it is not, corruption of blood remains, as it did before, at the common law.

This is a material view of the case, as it goes to the foundation of their argument. The tenure from the crown would also furnish a decisive objection, if it were wanted, to the claim of E. F. There are many authorities to show (and this I believe is the doctrine of all the judges, in all cases in which the question has occurred) that when land passes, as in the case put to us, by a grant of the crown, in tail, with the reversion in the crown; and the tenant in tail himself is attainted of high treason, the crown is in of its reverter. That the estate tail is extinguished and at an end, and consequently the issue is not within the protection of the statute *de donis*. So it has been held in all cases that have occurred where the tenant in tail himself is attainted.

I am not aware that any case has occurred upon the attainder of the issue on whom the inheritance would otherwise descend, which is the case before your lordships; but the same reasoning applies, with equal force, and I should say, *a fortiori*, to it.

Now I will state shortly the cases to which I have alluded. First, there is a case in Dyer, 115., in which this question presented itself in the most unfavorable view it could assume for the crown. There had been a gift by the crown to a person in tail, with the reversion to the crown. The tenant in tail made a lease, which was voidable, as against the issue in tail, but void as against the donor. The tenant in tail died, and the next issue in tail accepted rent from the lessee, and thereby confirmed the lease, which therefore stood good against him and his issue. The issue in tail afterwards committed high treason, and was attainted thereof; and the

attorney general filed an information of intrusion in the exchequer against the person who held under the lease, and the question to be decided was, whether the crown took the estate subject to the lease, or free from it. And the court, after long argument and much consideration, was of opinion that the crown took the estate free from the lease, for they said (I use nearly the words in Dyer), "The intail is utterly extinct and determined, and then the king is seised of his antient fee simple executed;" of course he takes independent of the lease, which springs out of the estate tail, and must come to an end with it. There is another case of the Queen *v.* Hussey, and which I cite, not as containing a decision on the point, but a recognition of the same doctrine. That was the case of a tenant in tail holding from the crown, and a re-grant by him to the crown; and there a question arose upon the effect of the re-grant; and in the judgment upon that case, it is likened to the case of a tenant in tail, with a reversion in the crown, committing high treason, and being attainted thereof, in which case the judges say that the king would be in, of his reverter. We have, therefore, first the decision in Dyer, and then a recognition of the same doctrine in the case I have last stated. There is also a case in lord Hobart of Sheffield *v.* Ratcliffe, in which the effect of the two statutes was very much considered; and I know that much of the argument used by lord Hobart upon that occasion, has been treated as springing from an indignation against those who were accused of offences against the dignity of the crown, mixed with a desire of enforcing the due forfeitures against them. But I cannot think that the opinion of so distinguished a judge is to be thus lightly put by. Lord Hobart considers this very point, whether corruption of blood was taken away by the statute *de donis*, in all cases that regarded the succession to estates tail; and he denies that the statute has this general operation. He also puts the very case I am now arguing, namely, that of the attainder of a tenant in tail of the gift of the crown, with the reversion in the crown; and he agrees with the other authorities upon the subject, that in that case, the king would be in of

Cro. Eliz. 519.

Pa. 334.

his reverter, and by no other title, and consequently the estate tail would be destroyed. I may therefore state this as a strong authority upon both these points.

In addition to these authorities, there is also, not a decided case, but the opinion of a very great man, whose name I need only mention to induce your lordships to give it that regard which it deserves so well; I mean lord chief baron Gilbert. Your lordships know that the title leases in Bacon's Abridgment was certainly of his composition; and it is stated as law under that title, (letter D.,) that if a tenant in tail, with the reversion in the crown, makes a lease for years, and dies, leaving a son, who accepts the rent and has issue, and the son commits high treason, and is attainted, the estate tail is determined, and the king is in of his reverter, and all leases of the tenant in tail are determined, as if he were dead without issue. The author then considers the reasoning in the cases in which this point had been decided, without approving of it altogether; but he adds, as the true ground of the decision, that where the crown makes a grant in tail to a subject, the donee holds of the crown by homage, fealty and other services, as incident to his grant; and that the performance of those services forms the condition of his tenure. Vol. iv. 25. 5th ed.

Now there cannot be a grosser violation of the fealty which the donee owes to the donor, in the case of the king, than the offence of high treason; and when the donee has committed high treason, and is attainted of it, he has put an end to the estate tail, by the violation of that condition upon which he held it; and it is therefore that the king is in of his reverter; and that in a very hard case too, as the lord chief baron put it, where a lease had been granted by the tenant in tail, which had been confirmed by the issue, but inasmuch as the crown was in of its reverter, that lease which was granted out of the estate tail, must fall with it. And then he puts the distinction between the case of the king having the reversion, and being entitled in remainder only. He says, if this had been an estate given to a tenant in tail, with remainder only to the king, and the tenant in

tail had been attainted of high treason, the king would have taken the estate tail only, by forfeiture, subject to the lease, because he could take nothing but the estate the tenant in tail had, and taking the estate the tenant in tail had, he must take it with all its incumbrances. The donee, in that case, owes no homage or fealty to the crown, violates no condition to his donor, by the commission of high treason. But it is very different where the donee holds under the crown, as donor, for there, by the commission of high treason, he violates the most important condition on which he holds his estate.

7 Rep. 33. This reasoning falls in very much with the doctrine which is laid down by the judges, in their second resolution in Neville's case, with respect to dignities. In the first they are said to have resolved that dignities might be intailed within the statute *de donis;* by the second they resolved that if he, who held a dignity, was attainted of high treason, his estate therein would be forfeited, without the aid of the 26 Henry VIII., by force of a condition *tacite* annexed to the estate, because he owes duties to the crown in respect of it, which are grossly violated by the offence of high treason. Such forfeiture must therefore be at the common law; and your lordships will see how strong an analogy this bears to the case of land granted by the king in tail, with the reversion in the crown. The estate in the land, like that in the dignity, subjects the possessor to certain duties, which form the condition of his tenure, and which he violates by the commission of high treason, and both are forfeited and extinguished by his attainder; and in neither is the issue protected by the statute *de donis.*

" For these reasons we think, that in this case the interest of E. F. is not protected by the statute *de donis.* But we have not been inattentive to the suggestion which fell from the highest authority, that supposing the argument to prevail, that corruption of blood is wholly taken away in regard to the succession to estates tail, by the statute *de donis,* it would still be matter of consideration whether, under the circumstances which are stated in this case, the issue in tail would not take,

though not for his own benefit, yet for the benefit of the crown. And upon a full consideration of that subject, we see no objection, on that supposition, to his so taking.

"A person attainted of high treason has capacity to take an estate, though not for his own benefit, yet for the benefit of the crown. If the effect of corruption of blood be taken away, we see no reason why C. D. might not, after his attainder, succeed by inheritance, as he might take by feoffment, not for his own benefit, but for the benefit of the crown.

"I have thought it right, in a question of so much importance, to explain the reasons of my opinion somewhat at large, and I believe that my brothers concur with me in them. But we certainly all agree in thinking that, in this case, the interests of E. F. are not protected by the statute *de donis*; and that if they were protected by that statute, upon the principle relied on, still they would fall within the 26 Henry VIII.

"There was one argument used at the bar which I have omitted to notice, namely, that by the 26 Henry VIII. nothing that came to an attainted person, after his attainder, would be forfeited. My lords, the words of the statute are, that he shall forfeit whatever he has, or whatever shall at any time come to him. It is insisted, that this means only the time between the commission of the crime and the attainder; but we see no ground for putting so limited a construction on the act. The intention of the legislature was to put estates tail upon the same footing as estates in fee simple, with regard to forfeiture; and a conveyance to an attainted person, ever so long after his attainder, would, I conceive, carry an estate to him, which he would be capable of taking for the benefit of the crown.

"For these reasons we are of opinion, that E. F. would take nothing."

§ 87. In all cases where a person has been attainted of high treason by act of parliament, or by judgment on an indictment for high treason, petty treason, or felony, the corruption of blood can only be removed by act of parliament. Restitution of blood.

§ 88. "Of restitutions by parliament," says lord Coke, 3 Inst. c. 106.

" some be in blood only, that is, to make his resort as heir in blood to the party attainted, and other his ancestors, and not to any dignity, inheritance of lands, &c. — And this is a restitution, *secundum quid*, or in part, and some be general restitutions, to blood, honors, dignities, inheritance, and all that was lost by the attainder; and this is *restitutio in integrum*; with an addition sometimes — That it shall be lawful for the party restored and his heirs to enter," &c.

" *In cartis benigna facienda est interpretatio, in fundationibus domuum religiosarum, hospitalium, et aliorum operum charitatis benignior, in testamentis magis benigna, in restitutionibus benignissima.* For it is holden in our books that in restitutions the king himself hath no favour, nor his prerogative any exemption, but the party restored is favoured."

Hale, P.C. c. 27.

§ 89. Lord Hale says, restitutions by parliament are of two kinds: one a restitution in blood, which only removes the corruption thereof, but restores not to the party attaint, or his heirs, the manors or honors lost by the attainder, unless it specially extend to it; the other is a general restitution, not only in blood, but of the lands, &c. of the party attaint.

P.C. c. 27.

§ 90. In the case of the barony of Lumley, the petitioner's counsel produced an act of parliament made in 1 Edward VI. upon the petition of John Lumley, eldest son and heir of George Lumley, son and heir apparent of John lord Lumley, whereby, after a recital of the attainder of the said George Lumley, by reason whereof the said John Lumley stood and was a person in his lineage and blood corrupted, and deprived of all degree, estate, name, fame, and of all other inheritance that should or might by possibility have come to him, by any other his collateral ancestors, on his said father's side, to whom he should or might have conveyed, as cousin and next heir of blood, by mesne degrees, by the said father. It was therefore enacted, that the said John Lumley, and the heirs male of his body coming, might and should be accepted and called from thenceforth by the name of lord Lumley; and that he and the heirs male of his body should have and enjoy in and at all parliaments, and all other places, the room, name, place, and voice of a baron of the realm. And that the said John

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Lumley and his heirs might be, and should be restored only in blood, as son and heir, and heirs to the said George Lumley, and made only heir and heirs in blood, as well to the said George, as to the said John lord Lumley, and either of them, by the name of lord Lumley.

The petitioner's counsel insisted that the said barony of Lumley was a barony in fee simple, and that the said John Lumley was by the act restored to it; and that the petitioner being heir general of John lord Lumley was entitled to a writ of summons.

On the other part it was contended by the earl of Scarborough, who opposed the claim, that admitting it to be a barony in fee simple, yet George Lumley being attainted and executed in the life of John lord Lumley his father, upon the death of the said John lord Lumley, the said barony became extinct. That by the said act of parliament a new barony of Lumley was created, and limited by express words to John lord Lumley, in tail male; and that, upon his death without issue male, the said barony likewise became extinct. That the attainder of George Lumley was not reversed by the said act, but remained in force; and that the restitution of the said John lord Lumley in blood only, while the attainder remained unreversed, could not possibly revive the ancient barony, which was before extinct, and merged in the crown, in consequence of that attainder.

That the construction of the act of 1 Edward VI. contended for by the petitioner would have this absurdity, if it prevailed, namely, that the same act must give the same barony to the same person, under two different limitations; one in tail male, the other in fee simple; and both in possession. And was not therefore to be admitted.

The house of lords appears to have been of this opinion, and to have rejected the claim on this ground.

§ 91. Where a person is outlawed upon an indictment for high treason, petit treason, or felony, his blood is, in most cases, corrupted; but it may be restored by act of parliament, or by a reversal of the outlawry, by writ of error; which may be done during the life of the person outlawed, or at any time

Stat. 29. Eliz. c. 2. 4 Burrows, Rep. 2551.

after. It should however be observed, that a writ of error to reverse an outlawry is not *ex debito justitiæ*, and can only be obtained by the favor of the crown.

Journ. vol. xviii. p. 119.

§ 92. The house of lords resolved, in 1702, that they would not in future receive any bill for reversing outlawries, or restitution in blood, that should not be first signed by her majesty, or her successors, kings and queens of the realm, and sent by her or them to their house first, to be considered there.

Dignities might be lost by poverty.

§ 93. All titles of honor having been originally annexed to lands, it followed that no person could be a peer, unless he had a real estate sufficient to support his dignity, which he could not alien without the consent of the crown. Therefore a peer could never be arrested for debt, the law presuming that he had sufficient lands and tenements in which he might be distrained.

6 Rep. 52. b. 7 Rep. 34. a.

Ch. iii. § 44.

§ 94. It has been already stated, that if a nobleman wants possessions to maintain his rank and estate, he cannot press the king, in justice, to grant him a writ of summons to parliament. And that it was so resolved in the case of lord Ogle, in the reign of king Edward VI. And that the lord Say and Sele, having mortgaged the greater part of his lands, the barony became extinct.

Rot. Parl. v. vi. 173. 4 Inst. 355.

§ 95. By an act of parliament made in 17 Edward IV., reciting that the king had erected and made George Nevill duke of Bedford, and had purposed to have given him for the sustentation of the said dignity, sufficient livelihood. — And for the great offences, unkindness, and misbehavings that the said John Nevill, his father, had done and committed to his highness, as was openly known, he had no cause to depart any livelihood to the said George. And that it was openly known that the said George Nevill had not, nor by inheritance might have, any livelihood to support the name, estate, and dignity of duke of Bedford. — As oftentimes it was seen that when any lord was called to high estate, and had not livelihood convenient to support the same dignity, it induced great poverty and indigence; and oftentimes caused great extortion, embracery, and maintenance to be had, to

the great trouble of all such countries where such estate should happen to be inhabited. — Wherefore the king, by the advice of the lords spiritual, &c. ordained, that from thenceforth the said erection and making of the same duke, and all the names of dignity to the said George, or to John Nevill his father, should be from thenceforth void, and of none effect.

§ 96. In lord Shrewsbury's case, the judges to whom it was referred, after noticing the above act, say, that although Nevill duke of Bedford had not any possessions to support his dignity, yet it could not be taken away from him without an act of parliament; and sir William Blackstone has observed, that Nevill's degradation is a singular instance, which serves at the same time, by having happened, to show the power of parliament; and by having happened but once, to show how tender the parliament hath been in exerting so high a power. 12 Rep. 107. 1 Comm. 402.

§ 97. As dignities cannot be aliened, surrendered, or extinguished by the persons possessed of them, neither can they be lost by the negligence of any of the persons entitled thereto, in not claiming them within any particular time. From which it follows, that dignities are not within the statutes of limitation. Are not within the statutes of limitation.

§ 98. In the printed case of the barony of Botetourt it is said: "There remains only to observe, that it is an undoubted maxim with regard to honors, that they cannot be extinguished, otherwise than by forfeiture, or by act of parliament. Claims to baronies which have long been dormant are difficult to be made out; but whenever the right happens to be clearly proved, the safety and dignity of the peerage are both concerned that no length of time should bar, or even prejudice the title. Most of the ancient baronies are so merged by the intermarriages of the great families, or so exposed to the objection of forfeiture, that very few instances have occurred of claims of the like nature; but in all those which have occurred, the length of time during which the honor has remained dormant never has formed a ground of objection."

"The barony of Fitzwalter was allowed in 1669 after it had been dormant for four hundred years. The barony of Clifford was allowed to the earl of Thanet in 1691, the an- Vide infra, c. v.

cestor from whom he claimed having died in 1605. The barony of Willoughby de Broke was allowed by the house of lords, upon a reference from the crown in 1695, though the honor had been dormant among coheirs from the year 1522, upwards of one hundred and seventy years. The barony of Berners was in like manner allowed in 1720, though it had been dormant for almost two hundred years; no person having been summoned, or sat in parliament, by that title, from the year 1539. The barony of Clinton was in like manner allowed in 1721, though it had been merged in a higher title from the year 1572, and had been for a considerable time in abeyance."

"These are instances where the honor has been claimed by a sole heir, upon the determination of the abeyance."

"There are others where the barony has been allowed, upon the determination of the abeyance, by the crown, in favor of one coheir."

"The case of the barony of Le Despencer, 2 James I., revived, allowed and confirmed to lady Mary Fane, after it had lain dormant above two hundred years, is a precedent which appears by the record to have passed upon very deliberate consideration and advice of the lords."

"The barony of Mowbray was revived in 15 Charles I. in favor of the family of Howard, after it had lain dormant from the 39 Edward III., the date of the last summons to any person as baron Mowbray; and in abeyance from 17 Edward IV. between the families of Berkley and Howard. It is in right of this revival that the duke of Norfolk claims to be the premier baron of England."

"The barony of Ferrers of Chartley was first revived in 2 Edward IV. in favor of Walter Devereux, though there had been no person summoned under that title from the 5 Edward II. On the extinction of the male line of the Devereux family in 1646, it remained in abeyance until 1677, when king Charles II. thought fit to determine the abeyance in favor of sir Robert Shirley, by whose descendants it has been since enjoyed."

"From all these instances this observation naturally arises;

that length of time, during which an honor may have been in abeyance, can neither bar the right of a sole heir, claiming upon the determination of the abeyance, by the natural extinction of the other heirs, nor the right of the crown to revive the barony, by an act of prerogative, determining the abeyance in favor of one coheir."

§ 99. Even an adverse possession or exercise of a dignity by persons not entitled to it, for eighty years, has been held not to operate as a bar to the real owner.

Barony of Willoughby of Parham.

§ 100. Sir William Willoughby, knight, was by letters patent 1 Edward VI. created lord Willoughby of Parham, to him and the heirs male of his body.

Printed case.

He was succeeded in the honor by Charles his only son, who had issue five sons, William, sir Ambrose, Edward, Charles, and sir Thomas. William, the eldest son, died in the life-time of his father, leaving issue William, his eldest son and heir, who succeeded his grandfather in the said honor; and he and his issue male enjoyed the same until the year 1680, when Charles lord Willoughby, the last heir male of the body of William, the first son of lord Charles, died without issue.

Sir Ambrose Willoughby, the second son of lord Charles, had issue Edward, who had issue Henry Willoughby, who went to Virginia in the year 1676, and continued there until his death in 1685.

Upon the death of Charles lord Willoughby, the last heir male of William the eldest son of lord Charles, the title belonged to the heir male of sir Ambrose, the second son; but Thomas Willoughby, the heir male of the fifth son of lord Charles, claimed and was admitted to the honor in 1680, as next heir male: and he and his heirs male enjoyed it to the year 1765, when that line became extinct.

Vol. xxiv. 336.

It appears however from the journals, that in 1733, Henry Willoughby, the heir male of sir Ambrose, petitioned the house of lords for the title; a writ of summons having been at that time issued to Hugh Willoughby, who was the then lineal heir male of the fifth son of lord Charles, stating the above facts: but the house does not appear to have paid any

attention to this petition, for immediately after it is an entry that Hugh lord Willoughby took his seat.

This Hugh lord Willoughby died without issue in 1765, and in 1767 Henry Willoughby claimed the barony by petition to the king, as the then heir male of the body of sir Ambrose,

Journals, vol. xxxi. 530. This petition being referred to the house of lords, it was there resolved, "That the petitioner had a right to the title, dignity and peerage of Willoughby of Parham, which was enjoyed from the year 1680 to the year 1765, by the male line, then extinct, of sir Thomas Willoughby, youngest son of Charles lord Willoughby of Parham; who were successively summoned to parliament by descent, in virtue of letters patent bearing date the 16th of February, 1 Edward VI., and sat as heirs male of the body of sir William, created lord Willoughby of Parham by the said letters patent; contrary to right and the truth of the case. — It then appearing that sir Ambrose Willoughby, the second son of the said Charles, and the elder brother of the said sir Thomas, who was averred to have died without issue, left a son, and that the claimant was great-grandson and heir male of the body of such son, and consequently heir male of the body of the said sir William, who was created lord Willoughby of Parham. The male line of the eldest son of the said Charles lord Willoughby of Parham having failed in or before the year 1680. And that the proof of the petitioner's pedigree being clear; the Idem. 537. contrary possession ought to be no bar to his claim; as there was no person in being interested under such possession: without prejudice to the question if there was."

A writ of summons was accordingly issued to Henry Willoughby, the petitioner, and he took his seat as lord Willoughby of Parham.

CHAPTER V.

DESCENT OF DIGNITIES.

§ 1. *Descent of Dignities by Tenure.*
13. *Descent of Dignities by Writ.*
16. *The Half-Blood may inherit.*
21. *And also Female Heirs.*
27. *Abeyance of Dignities by Writ.*
37. *The Crown may terminate the Abeyance.*
43. *Modes of terminating an Abeyance.*
45. *Effect of a Writ to one of the Heirs of a Coheir.*
50. *Cases of Claims to a Coheirship in a Barony.*
56. *Where only one Heir the Abeyance terminates.*
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72. *Attainder of one of two Coheirs does not determine the Abeyance.*
75. *Descent of Dignities conferred by Writ on the eldest Sons of Peers.*
81. *Is the same as that of the ancient Barony.*
85. *Descent of Dignities by Letters Patent.*
91. *Cases of Claims to Dignities of this kind.*

SECTION I.

Descent of dignities by tenure.

DIGNITIES by tenure appear to have always been hereditary in England, and to have descended in the same manner as the castles or manors to which they were annexed. So that the descent of dignities of this kind, in the male line, must have been exactly similar to that of estates in fee simple; unless the castles or manors to which the dignity was annexed were intailed, in which case the dignity descended to the person intitled to those castles or manors under the intail; as appears from the several cases which have been already stated.

Ante, c. ii. § 79. &c.

§ 2. There is one very singular instance in the reign of king Henry II. of the crown's preferring a younger son to the succession of a barony.

Mad. Exch. c. 13. § 8.

Galfridus de Mandeville senex tenuit baroniam de Merservude cum omnibus pertinentiis suis, sicut jus suum et hæreditatem, et genuit de prima uxore sua sibi desponsata, Robertum de Mandevill. Ipse Robertus genuit Galfridum de Mandevill de Croere.

Galfridus de Mandevill genuit Robertum de Mandevill patrem prædicti Roberti, qui ut dictum est, rege tenuit. Galfridus autem senex de Mandevill, mortua prima uxore sua, aliam uxorem desponsavit, de qua genuit Radulphum de Mandevill, qui post obitum ipsius Galfredi senis, tenuit prædictam baroniam per voluntatem Henrici regis, eo quod fuit melior miles quam Robertus de Mandevill frater suus, quam genuit ex prima uxore sua, ut dictum est.

§ 3. In ancient times the right of primogeniture appears to have taken place in the descent of dignities by tenure to females, as well as to males. For Bracton, treating of the partition of estates among females, has the following passage: —

Bract. 76. a. and b. *De hoc autem quod dicitur quod de feodo militari veniunt in divisionem capitalia messuagia, et inter cohæredes dividuntur, hoc verum est, nisi capitale messuagium illud sit caput comitatus, propter jus gladii quod dividi non potest, vel caput baroniæ castrum vel aliud ædificium. Et hoc ideo ne sic caput per plures particulas dividatur, et plura jura comitatum et baroniarum deveniant ad nihilum, per quod deficiat regnum, quod ex comitatibus et baroniis dicitur esse constitutum.*

§ 4. Now, as the eldest daughter or sister had a right to the principal mansion, *jure esneciæ*, to which, if it was *caput comitatus* or *baroniæ*, the service of attending parliament appears to have been always annexed, she would in those times have been entitled to the dignity.

§ 5. In Mr. Selden's letter to Vincent on his discovery of errors in Brooke's Catalogue of Nobility, is the following observation: — "So Bracton supposes, it seems, that a legal possession of the *caput comitatus*, and *caput baroniæ*, had always joined with it the title and dignity of a baron." And this was exactly conformable to the feudal law, in which an indivisible feud descended to the eldest daughter.

§ 6. Where the elder daughter of a baron was married in the lifetime of her father, the crown appears to have formerly had a right to confer the estates, whereof the baron died seised, on his unmarried daughter. Thus in Fitzherbert's Abridgement it is said: — "*Nota que in nuper obiit anno 3 Henry III. porté par 2. Soers vers le tierce soer, fuit all' in barre un custome*

Tot. Prescrip. pl. 56.

que fuit tel.—Quod si aliquis baro domini regis, tenens de rege, obiisset, et non haberet hæredes nisi filias, et primogenitæ filiæ maritati sunt in vita patris, dominus rex daret postnatam filiam quæ remaneret in hæred' patris, alicui militum suorum, cum tota hæreditate patris sui, de qua obiisset seisitus; ita quod aliæ filiæ nihil recuperent versus postnatam filiam in vita sua. Et omnes reges habuerunt hanc dignitatem a conquestu.

§ 7. What the opinions respecting the right of succession to dignities were in the reign of king Edward I. may be collected from the unanimous answer of the parliaments of England and Scotland, previous to the adjudication of the succession to the crown of Scotland, when disputed between the descendants of the three daughters of David earl of Huntingdon, brother to Malcolm and William kings of Scotland; and the subsequent decision thereon. Rymer's Fœd. vol. ii. 583.

The answer was, that when the laws of the two countries differed, the case was to be governed by the laws of the superior kingdom, namely England. And that the right of succession to the kingdom was to be judged by the rules observed in the cases of earldoms, baronies, and other impartible inheritances.

Bruce, the descendant of the second daughter, objected, that although in partible heritages, according to the laws observed among subjects, the elder sister had some preference, yet in an impartible kingdom the elder sister ought to have no preference.

Baliol, the descendant of the eldest sister, answered, that whatever might be the case in other kingdoms, yet by the laws both of England and Scotland*, in which kings reign in lineal succession, and earls and barons succeed in the same manner, the eldest sister was to be preferred to the younger in such succession.

Afterwards Bruce and Hastings, the descendants of the two younger sisters, alleging that the kingdom was partible, as

* By the law of Scotland all heritable titles of nobility still go to the eldest heir portioner; that is to the eldest daughter. Macdouall's Inst. b. 2. tit. 5. § 83.

being a feud held of the king of England, claimed their respective shares of all the lands and liberties, with the appurtenances, of which Alexander the last king of Scotland had died seised, excepting the royal name and dignity, to hold *in capite*, by homage, of the king of England, as superior lord of Scotland.

Judgment was pronounced in favor of Baliol, as the heir of the eldest daughter.

Baron. § 8. Dugdale mentions that king Edward III. by his letters patent declared Lawrence Hastings to be earl of Pembroke, by reason of his descent from the eldest sister and coheir of Aymer de Valence, who died seised of that dignity.

Tit. of Hon. c. 5. § 9. These letters patent are stated by lord Coke in his fourth Institute, c. 40., and by Selden; and as they recognize the right of the eldest sister to the dignity to be sanctioned by the opinions of the most learned persons of that time, a part of them shall be here transcribed.

§ 9. *Cum itaque hæreditas bonæ memoriæ Audomari de Valentia comitis Pembrochiæ (ut dicitur) jampridem sine hærede de corpore suo procreato decedentis, ad sorores suas fuerit devoluta, inter ipsas et earum hæredes proportionabiliter dividenda. Quia constat nobis quod Præfatus Laurentius qui dict' Audomar' in partem hæreditatis succedit, est ex ipsius Audomari sorore seniori descendens, et sic peritorum assertione, quos super hoc consuluimus, sibi debeatur prærogativa nominis et honoris, justum et debitum reputamus ut idem Laurentius ex seniori sorore causam habens, assumat et habeat nomen comitis Pembrochiæ, quod dictus Audomarus habuit dum vivebat. Quod quidem, quantum in nobis est, sibi confirmamus, ratificamus et etiam approbamus.*

§ 10. With respect to all those ancient baronies which were originally annexed to lands, and after the alienation of those lands continued to be enjoyed by the alienors, they appear to have been descendible to the lineal heirs of the ancient possessors of them; and where there was a failure of heirs male, they descended to females.

Barony of Dacres, Collins, 25. § 11. In the latter end of the reign of queen Elizabeth, Margaret, the sister and sole heir to Gregory lord Dacres,

claimed the barony of Dacres. The case was referred by her majesty to lord Burleigh, and lord Howard of Effingham.

It appears from the statement in Collins, that in the reign of king Henry II. this dignity belonged to Hubert de Vaux; but how he came by it, whether by writ or otherwise, being so ancient, could not be discovered.

The commissioners certified their opinion, that as the said barony appeared to have descended formerly unto the heirs general, when and so often as the heirs male thereof had failed, and that the said Margaret, by the death of her brother without issue, was the only heir of that house or family then surviving, her majesty might at her pleasure allow unto her the name, stile and title of the said barony; following therein the example of her highness's noble progenitors in like cases.

§ 12. The claim of the same Margaret to the barony of Dacres was in 1 James I. again referred to commissioners, who certified in the same manner. 1 Inst. 165. a.

§ 13. With respect to dignities created by writs of summons, whatever doubts existed formerly respecting their being hereditary, it was fully settled in the time of lord Coke, that they were descendible to all the lineal heirs of the person first summoned; from which they acquired the name of baronies in fee. But that this is not a correct description of them has been already shown. Descent of Dignities by Writ. Ante, c. 3. § 25.

§ 14. In the descent of dignities by writ, the right of primogeniture takes place among males; therefore, where a person possessed of a dignity of this kind dies, leaving issue several sons, the dignity descends to the eldest; for being an inheritance of an indivisible nature, it cannot go to them all.

§ 15. The descent of dignities by writ is however in some respects different from that of lands, for possession does not affect it, as every one claiming a dignity of this kind must make himself heir to the person first summoned; not, as in the case of lands, to the person last seised.

§ 16. In consequence of this principle, a brother of the half-blood will inherit a dignity, in preference to a sister of the whole blood. And lord Coke says of dignities, whereof no The Half-blood may inherit. 1 Inst. 15. b.

3 Rep. 42. a.

other possession can be had but such as descend (as to be a duke, marquis, earl, viscount, or baron,) to a man and his heirs, there can be no possession of a brother to make the sister inherit; but the younger brother being heir (as Littleton saith) to the father, shall inherit the dignity inherent in the blood, as heir of him who was first created noble.

1 Inst. 15. b. n. 3.

§ 17. Lord Hale, in a note to this passage, which has been published by Mr. Hargrave, observes, that if it was a feudal title of honor, as the earldom of Arundel, or barony of Berkeley; there *possessio fratris* should hold well, because the title was annexed to land.

Barony of Grey. Ch. iv. § 58. Collins, 195.

§ 18. It has been stated, that in 1640 Mr. Longville claimed the barony of Grey of Ruthyn. It appeared that George earl of Kent and baron Grey of Ruthyn had two wives, by the first of whom he had issue Richard, and by the second Henry. Richard sat in parliament, and died without issue. The petitioner was descended from Henry; and the question was, whether the barony descended from Richard to Henry, he being of the half-blood.

Journ. v. iv. 149. Cro. Car. 601.

This case having been referred to the house of lords, the following question was proposed by the judges: — "One being created a baron to him and his heirs, hath issue a son and a daughter by one venter, and a second son by another venter, and the eldest son hath the barony, and sits in parliament, and afterwards dies without issue. — Whether the second son shall have that dignity as heir to his father, or the sister shall have it, as *possessio fratris* in lands, &c. All the justices resolved that there is not any *possessio fratris* of a dignity, but it shall descend to the son; for the younger son is *hæres natus*, and the sister is only *hæres facta*, by the possession of her brother, of such things as are in demesne, but not of dignities, and such like, whereof there cannot be an acquisition of the possession, according to Coke Lit. 15. b. and Coke's Rep. lib. iii. fo. 42."

Collins, 255.

§ 19. Lord chief justice Brampston in delivering his opinion in this case, observed, that one of the reasons why there could be no *possessio fratris* of a barony was, because the title to every barony must be by record. Baron or no baron must

be tried by record: so that whosoever shall make a title to a barony must resort to the record, and begin his title there, and so consequently must make himself heir to the person first ennobled by that record, which the daughter could not do, notwithstanding the possession of the brother; for she was not heir to the first ancestor, but to the brother of the whole blood.

Barony of Fitzwalter. Ante, ch. iv. § 60.

§ 20. In the case of the barony of Fitzwalter 1668, the same objection was made before the privy council to Mr. Mildmay's claim; and the question being put to the two chief justices, and lord chief baron Hale, they all agreed that the half-blood was no impediment to the descent of a dignity to an heir-general: with which opinion, the king, who was present, being satisfied, Mr. Mildmay got the barony.

And also Female Heirs.

§ 21. Dignities created by writ, appear to have always been descendible to female heirs, in default of males; and transmissible by such female heirs to their descendants.

Collins, 233. Infra.

§ 22. Thus the barony of Roos, which was created by writ of summons, descended from Edmund de Roos lord Roos, who died in 24 Henry VII., to sir George Manners, in right of his grandmother Eleanor, daughter of the said Edmund lord Roos; and this sir George was, in respect of his mother Eleanor, summoned to parliament by king Henry VIII., by a writ directed George Manners de Rosse, chevalier, and took his seat as lord Roos, according to the antiquity of that barony.

§ 23. This doctrine appears to have been admitted in the case of the barony of Grey of Ruthyn, in the year 1640; but was more fully considered, and solemnly established in the following case: —

Barony of Clifton. Collins, 291.

§ 24. Catharine lady O'Brien claimed the barony of Clifton of Leighton Bromswold in 1673; and her petition having been referred by the king to the house of lords, the committee of privileges reported "That Jervas lord Clifton was summoned by writ to parliament 6 James I. by the title of lord Clifton of Leighton Bromswold, so as the barony being a fee simple ought to descend from the said lord Clifton upon his heirs; and that the lady Catharine O'Brien, the petitioner, being

the heir gradually and lineally descended from the said lord Clifton, the barony did of right descend to her and her heirs."

It was ordered by the house that the judges should give their opinion on this case, which they accordingly did in the following words: —

Journ. vol. xii. 629.

" The lord chief justice of the king's bench, the lord chief justice of the common pleas, chief baron Turner, baron Littleton, justice Atkins, justice Ellice, and baron Thurland were unanimous in their opinions, that taking the case in fact to be as his majesty's attorney general reported it to be, and as it stood transmitted to that house, they found it to be thus, as to that lady's claim of the said barony. That sir Jervas Clifton was summoned to parliament by the name of Jervas Clifton of Leighton Bromswold by writ, dated 9 Jacobus I. &c.

" That accordingly he did come in and sit in parliament as one of the peers of England.

" That he died 16 Jacobus I., leaving issue behind him Catharine, his sole daughter and heir, who married to the lord Aubigny, afterwards duke of Lenox.

" That the said duke 17 Jacobus I. was by letters patent created baron Leighton, of Leighton Bromswold, in the county of Huntington, to him and the heirs male of his body, whereof none were then living.

" The petitioner was lineally descended from him, and was his heir, (by the said report,) and as such then claimed the barony of Clifton.

" All which being admitted to be true, they were of opinion,

" First, — That the said Jervas, by virtue of the said writ of summons, and his sitting in parliament accordingly, was a peer and baron of this kingdom, and his blood thereby ennobled.

" Secondly — That his said honor descended from him to Catharine his sole daughter and heir; and successively after several descents, to the petitioner as lineal heir of the said lord Clifton.

" Thirdly — That therefore the petitioner was well entitled to the said dignity."

Upon consideration had, it was resolved by the lords spiritual and temporal, &c. that the said Catharine lady O'Brien had right to the barony of Clifton.

The king assented to this determination, and confirmed the barony to her.

§ 25. Notwithstanding this solemn decision, the same point was again argued twenty-one years after, in the case of the barony of Willoughby de Broke, of which an account will be given hereafter. But the house of lords, although they appear to have been ignorant of this case, held that a writ of summons, and a sitting, created an hereditary dignity, descendible to females, and this doctrine appears to have been again admitted in the following case: —

Barony of Wentworth. Journ. vol. xvii. 81.

§ 26. Martha, the wife of sir Henry Johnson, claimed in 1710, the barony of Wentworth, and stated in her petition that king Henry VIII., by his writ directed to Thomas Wentworth, of Nettlested, in the county of Suffolk, knight, summoned him to be a baron and peer of the realm by the name of Thomas lord Wentworth; by virtue whereof not only the said Thomas, but also the heirs of his body, had enjoyed the said title and barony of Wentworth until the death of Thomas lord Wentworth in 1664, leaving issue the lady Henrietta Maria, his sole daughter and heir, who died without issue; whereby the lady Ann Wentworth relict of John lord Lovelace, and mother to John lord Lovelace, the petitioner's father, being the only surviving daughter of Thomas lord Wentworth, earl of Cleveland, and aunt to the said Henrietta Maria, became heir to the said barony. So that the petitioner was become the sole and undoubted heir of that barony of Wentworth: and therefore prayed that his majesty would confirm the said barony of Wentworth to the said Martha, and the heirs of her body.

Idem 91.

This petition having been referred to the house of lords, it was resolved that the petitioner had right and title to the barony of Wentworth; and the king confirmed it accordingly.

Abeyance of dignities by writ.

§ 27. When dignities by writ became descendible to females, as there was no *caput baroniæ*, the eldest daughter or sister had no better claim to inherit them than her sisters; but still it is probable that as by the feudal impartible inheritances descended to the eldest daughter, the same practice was adopted in the descent of personal honors. For it appears to have been held, so late as in the reign of king Henry VI., that the eldest daughter had a superior claim to the dignity of her ancestor.*

Baronage, vol. ii. 245.

§ 28. Thus Dugdale mentions that, in 25 Henry VI., James Fiennes, by reason that Joan, his mother, was third sister and coheir to William de Say, was summoned to parliament by the title of lord Say and Sele. And for further corroboration of that title and honor, upon the first of November following, he had a full confirmation and quit claimer thereof from John lord Clinton; as also of the arms of Say, which, by reason of the descent of the said John lord Clinton from Idonea, the eldest sister of the said William de Say did or might belong to him.

Collins, App. No. 1.

§ 29. In the reign of queen Elizabeth, Henry Vernon, esq. claimed the barony of Powis; stating, that the said dignity was created by writ of summons in 7 Edward II., and that he was the sole heir of Anne, the eldest daughter of John Ludlow, to whom the same descended on the death of sir Edward Grey, the last lord Powis; and mentioned a variety of cases where persons in right of their mothers, grandmothers, &c., having been the eldest daughters or coheirs to a baron, had enjoyed the name, stile, and dignity of the barony, according to the most ancient usage and laudable custom of England.

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* In the printed case of Mr. Burrell and lady Willoughby de Eresby, in 1781, claiming the office of lord great chamberlain of England, it is stated that the office of steward of England had descended in two instances to the eldest daughter. The office of constable of England had come to Humphrey de Bohun, by his marriage with the eldest daughter of Milo Fitzwalter, and the office of earl marshal of England had come to Roger Bigot, earl of Norfolk, in right of his mother, Maud, eldest daughter of William Marshall, earl of Pembroke. Brown's Cases in Parliament, vol. ii. p. 146. And this was understood to be the law down to the time of lord Coke, who states it to be so. 1 Inst. 165. a.

The claim was probably abandoned, as nothing farther appears.

§ 30. It became, however, established in course of time, that where a baron by writ died, leaving only daughters or sisters, or other female heirs, as the dignity was of an impartible nature, and incapable of being enjoyed by two or more heirs, it fell into a dormant state. Our ancient writers, therefore, considered it as in abeyance or suspense; or else as vested in the crown, during the continuance of the coheirships.

§ 31. Lord Coke, in his first institute, has stated a case in 23 Henry III. in these words:— "Note, if the earldom of Chester descend to coparceners, it shall be divided between them, as well as other lands, and the eldest shall not have this seignory and earldom to herself entire; *quod nota*, adjudged *per totam curiam*." And he makes the following observations on this case:— Fitz. Ab. Tit. Partition, 18.

"By this it appeareth that the earldom (that is, the possessions of the earldom,) shall be divided; and that where there be more daughters than one, the eldest shall not have the dignity and power of the earl, that is, to be a countess. What then shall become of the dignity? The answer is, that in that case the king, who is sovereign of honour and dignity, may, for the uncertainty, confer the dignity upon which of the daughters he please; and this hath been the usage since the conquest, as is said."

§ 32. The above observations of lord Coke do not seem to be well founded; for it appears from Dugdale, that Ranulph earl of Chester died in 16 Henry III. without issue, leaving four daughters, of whom the eldest, Maud, was married to David, earl of Huntingdon, brother to William king of Scotland, by whom she had a son, surnamed Scotus, who succeeded Ranulph in the earldom of Chester. But the reason was, that in the partition of the vast possessions of Ranulph, this John had for his part, his mother being dead, the whole county of Chester. Baronage, vol. i. 44. Collins, 99.

§ 33. The decision cited by lord Coke must have taken place on the death of the above-named John, in 1237, (ac-

cording to Mathew Paris,) leaving four sisters. But it cannot be relied on as an authority; for it appears from Knyghton, c. xxxv. That this was a special and arbitrary exertion of the prerogative, by which the king, probably from jealousy of the great power and regalities of the earls of Chester, continuing in the presumptive heir to the crown of Scotland, not only took the dignity of the earldom into his own hands, but also the lands appertaining to it, making compensation to the four sisters of the last earl in other lands.

Knyghton, c. xxxv. *Johannes Scotticus comes Cestriæ obiit sine liberis, et sepultus est Cestriæ. Verum quia terra sua gaudebat regali prerogativa, comitatus ejus ad manus regis devenit, datis aliis terris hæredibus sororibus suis in compensationem; ne tam præclara dominatio inter colos feminarum dividi contigerit.*

§ 34. There is every reason to believe that the prerogative of conferring a dignity in abeyance on whichever of the heirs the crown pleased, is not so ancient as the reign of king Henry III., or even as that of his son Edward I. As it is not mentioned in the proceedings respecting the claims to the crown of Scotland in the latter of those reigns, for if it were then generally known and acknowledged, Edward would probably have availed himself of it, in order to dispose of the crown, as sovereign lord, according to his pleasure. And lord Coke in another place says, Camden told him that *some* held, if a baron died having issue several daughters, the king might confer the dignity on him who married any of them, as had been done in divers cases: namely, in the case of lord Cromwell, who had issue divers daughters, and king Henry VI. conferred the dignity upon Bourchier, who married the youngest daughter, and he was called lord Cromwell, and so in other cases.

Ante.

12 Rep. 112.

§ 35. In the case of the earldom of Oxford, in 1625, a report was made to the house of peers by lord chief justice Crew, that he, with the lord chief baron, justice Doddridge, justice Yelverton, and baron Trevor had, according to the order of the house, considered the titles of the competitors to the earldom of Oxford, the baronies of Bulbeck, Sandford, and Baldesmere, and the office of great chamberlain of Eng-

Collins, 175.

land; and they certified that "As touching the baronies of Bulbeck, Sandford and Baldermere, their opinion was, that the same descended to the general heirs of John, the fourth earl of Oxford, who had issue John the fifth earl of Oxford, and three daughters; one of them married to the lord Latimer, another to Wingfield, and another to Knightley, which John, the fifth earl of Oxford, dying without issue, those baronies descended upon the daughters as his sisters and coheirs; but these dignities being entire, and not dividable, they became incapable of the same, otherwise than by gift from the crown; and they in strictness of law reverted to, and were in the disposition of king Henry the Eighth."

The house of lords certified to the king, that for the baronies they were wholly in his majesty's hands, to dispose of at his own pleasure. Journ. v. iii. 552.

§ 36. In the case of the barony of Grey of Ruthyn, the house of lords put the following question to the heralds:— "When a barony is to descend unto two daughters, whether the same have been in his majesty's disposal?" to which they answered, — "When a baron dies and leaves daughters and coheirs, we find divers precedents touching the disposition of the barony. Collins, 248.

"First — Where there were two daughters and coheirs, the eldest daughter's issue male had the barony. For example, Norton baron of Alfreton, Sandwich baron of Folkstone.

"Secondly — Where there were daughters and coheirs, and the youngest daughter's issue male had the barony. — The lord Cromwell, *tempore Henry* VI., the barony of Moulton.

"Thirdly — Where there were daughters and coheirs, and the king did not dispose of the barony to the issue of either of them. Charlton lord Powrys, the lord Tregose, the lord Manley, the lord Morwick, the lord Muschamp, the lord Clavering."

§ 37. The expression of the judges, in the case of the earldom of Oxford, that baronies in abeyance were in the disposition of the crown, is too general; for it is not in the power of the crown to grant such baronies to a stranger. The The crown may terminate the abeyance.

crown has only the prerogative of terminating the suspension or abeyance of the dignity, by nominating one of the coheirs to it; and such nomination operates, not as a creation of a new barony, but as a revival of the ancient one. For the nominee becomes entitled to the place and precedence of the ancient barony, to which he is thus nominated. Bourchier lord Cromwell was perhaps the first person in whose favor the crown exercised this prerogative; but there are so many subsequent instances of it, that it cannot now be questioned.

Barony of Beaumont, infra.

Collins, 414.

§ 38. Robert Devereux, earl of Essex, viscount Hereford, and lord Ferrers of Chartley, a barony descendible to heirs general, died without issue in 1646, leaving his two sisters his coheirs; and in 1678, sir Robert Shirley, grandson of the lady Frances, one of the sisters and coheirs of the said earl of Essex, was summoned to parliament by writ, directed to Robert Shirley de Ferrers, chevalier; and it was opened to the house by the lord chancellor, how his lordship came in upon descent; and so no introduction to be; and he was placed upon the barons bench, next below the lord Berkeley.

Journ. v. xiii. 130.

§ 39. In 1720, his late majesty king George I. granted a writ of summons to Hugh Fortescue, esq. by the title of Hugh Fortescue de Clinton, chevalier; and when he took his seat, the lord chancellor explained to the house his descent; and how he was one of the heirs of Theophilus late earl of Lincoln, and baron Clinton, which barony was then in abeyance between Mr. Fortescue and Samuel Rolle, esq.

1720—1. Journ. v. xxi. 477.

§ 40. In 1763, his late majesty issued his writ of summons to sir Francis Dashwood, baronet, by the title of lord Le Despencer; the lord chancellor informing the house of lords that he was one of the heirs of lady Mary Fane, in favor of whom and whose heirs king James I. had revived the ancient barony of Le Despencer; and thereupon he was allowed to take his seat upon the upper part of the bench, next above lord Abergavenny.

Journ. v. xxx. 403

§ 41. In 1734, Margaret, third daughter of Thomas earl of Thanet, and wife of Thomas earl of Leicester, who was one of the coheirs to the barony of De Clifford, which had fallen into abeyance by the death of the earl of Thanet, leaving five daughters and no son, was, by letters patent, confirmed baro-

ness Clifford, And this barony having again fallen into abeyance by the death of lady De Clifford without issue, Edward Southwell, one of the coheirs of the barony was summoned, in 1776, to parliament by writ, as baron De Clifford. Journ. vol. xxxiv. 671.

§ 42. The barony of Willoughby de Eresby fell into abeyance in the year 1779, by the death of Robert Bertie, duke of Ancaster and Kesteven, without issue, leaving lady Priscilla Barbara Elizabeth, and lady Georgina Charlotte Bertie, his two sisters and coheirs. And in the following year his majesty confirmed the barony of Willoughby de Eresby to lady Priscilla Barbara Elizabeth, then the wife of Peter Burrel, esquire, and the heirs of her body.

Modes of terminating an Abeyance.

§ 43. When the king terminates the abeyance of a dignity in favor of a person who is not a peer, he directs a writ of summons to be issued to him, by the stile and title of the barony in abeyance, as in the case of lord Ferrers of Chartley, and that of lord Le Despencer. But where the person in whose favor an abeyance is to be terminated is already a peer, and has a higher dignity, there the king, by his letters patent, confirms the barony to him. And in the case of a female, the abeyance is also terminated by letters patent.

Collins, App. No. 6.

§ 44. It was formerly the practice to confirm the barony to the coheir, and his or her heirs; as in the case of the barony of Ogle, which is confirmed to Catherine Ogle, *et hæredibus suis imperpetuum.* But it is more properly to the heirs of his or her body. For no one can be heir of the body of the person in whose favor the abeyance is terminated, without being also lineally descended from the person first summoned. Collins's Peer. vol. vi. 618.

Effect of a Writ to one of the Heirs of a Coheir.

§ 45. When the abeyance of a dignity is terminated by a writ of summons to parliament, different opinions have been held respecting the extent of the operation of such writ. Some eminent persons, particularly lord Thurlow, are said to have held that where a barony is in abeyance between the descendants of two coheirs, and the king issues his writ of summons to one of the heirs of the body of one of the coheirs, the abeyance is thereby terminated, not only as to the person summoned, and the heirs of his body, but also as to

all the heirs of the body of such original coheir. But the better opinion seems to be that the effect of a writ of summons, in a case of this kind, is only to terminate the abeyance, as to the person summoned, and the heirs of his body; and that upon failure of heirs of the body of the person so summoned, the barony will again fall into abeyance between the remaining heir or heirs of the body of the original coheir, one of whose heirs was so summoned, if any, and the heir or heirs of the body of the other coheir.

§ 46. This latter opinion appears to have been held by the late lord Alvanley in his report on the petition of sir John Griffin, for the barony of Howard of Walden, in which he says, the said barony "Was then in abeyance between the petitioner and the earl of Bristol, in which case his majesty had an undoubted right to allow and confirm the same barony of Howard of Walden either to the petitioner, or to the said earl of Bristol; and such person to whom the same was so confirmed, and the heirs of his body, would hold and enjoy the said barony, and all the privileges thereunto belonging, exclusively of the other and the heirs of his body; whose right to the same would remain dormant and suspended so long as there should be issue of the body of the person to whom the same should be so confirmed."

Infra. § 47. All the judges appear to have held the same doctrine some years after; for lord chief justice Eyre, in delivering their opinion in the case of the barony of Beaumont, says, "One remedy, and one only, has been provided by law for the case of a dormant peerage: it is *sui juris*, of a most extraordinary nature, but very suitable to the dignity of the subject to which it is applied. I mean the prerogative right of calling one of the coparceners, by writ of summons, to sit in the seat of his ancestors. He will from thenceforth be in the exclusive possession and enjoyment of the inheritance, and will hold it to him and the heirs of his body; yet still he is but one of the coheirs of his ancestor, and the rest of the coheirs still remain coheirs: and in the event of the failure of heirs of the body of that coheir whom the prerogative hath thus preferred, the other coheir, if but one, would take the

whole inheritance; or if there were more than one, the barony would again fall into abeyance."

§ 48. In support of the opinion of lord Alvanley and that of the judges in the Beaumont case, it may be observed, that no act of the king's shall enure beyond its apparent intent, when it may otherwise operate to the injury of third persons. And that the apparent intent of a writ of summons in a case of this kind is answered by the seating of the person to whom it is addressed; and by that means determining the abeyance between him and the other coheir; and declaring the king's election, which of the two coheirs shall succeed to the dignity.

§ 49. It is also a principle of law that possession does not affect the descent of a dignity, and that a writ of summons to parliament by an ancient title, as the summons of the eldest son of a peer, in the lifetime of his father, by the name of an ancient barony, then vested in the father, will not operate so as to give any title by descent, collateral or lineal, different from the course of the ancient barony, as was determined in the case of the barony of Sydney of Penshurst; and that he who claims a dignity must make himself heir to the person on whom the dignity was originally conferred, not to the person who last enjoyed it.

Infra. Vide barony of Powis, 1800, infra.

§ 50. In consequence of the prerogative which the crown has so frequently exercised in determining the abeyance of dignities, several claims have been made to a coheirship in a barony in abeyance; but the crown has seldom terminated an abeyance of this kind in favor of one of the coheirs without first referring the case to the house of peers, in order to be satisfied of the existence of the barony; and of the persons between whom it was in abeyance.

Cases of claims to a Coheirship in a Barony.

§ 51. Thomas Felton, esquire, petitioned the king in 1691, on behalf of his daughter, Elizabeth Felton, claiming for her a coheirship in the barony of Howard of Walden, stating that lord Thomas Howard, second son of Thomas duke of Norfolk, was summoned to parliament by writ in 39 Elizabeth, by the title of lord Howard de Walden, and sat there in pursuance thereof.

Barony of Howard of Walden, 1691. Journ. vol. xv. p. 4. 25. 53. 57.

That he was afterwards created earl of Suffolk to him and the heirs male of his body; and died in 1626, leaving a son Theophilus, who was earl of Suffolk and baron Howard of Walden, who died in 1640, leaving issue James his eldest son, who was earl of Suffolk and baron Howard of Walden, and two other sons. That this James, earl of Suffolk and baron Howard of Walden, died without issue male, leaving two daughters, lady Essex, married to Edward Griffin, and lady Elizabeth, married to the said Thomas Felton, by whom she had issue the claimant Elizabeth Felton, her only daughter.

That the claimant, as the only daughter and heir of lady Elizabeth Felton, was one of the coheirs to this barony, and prayed to have it confirmed to her.

This claim was opposed by lady Essex Griffin, who stated that the strongest pretence to the said barony was in her as eldest daughter and coheir to the said James, earl of Suffolk, (the stream of precedents running that way), and the rather for that she had issue male, of full age capable to enjoy the said honor; whereas Mr. Felton had only issue female an infant.

Ch. Baron Ward's Collect.

The claim was also opposed by the earl of Suffolk, who contended that baronies in fee had been generally continued to the heirs male, and not to the heirs general; and that there were several ancient earldoms whose titles for their eldest sons lay in their ancient baronies, by writ: and if the king should grant such baronies to the heirs general, such eldest sons, who were always called after their fathers' most ancient baronies (where there was no viscount), would go without any title at all: which would be a great hardship on many of the nobility. No resolution was made.

Barony of Botetourt. Printed case.

§ 52. In the year 1764, Norborne Berkeley, esquire, petitioned his majesty to be nominated to the ancient barony of Botetourt, stating that John de Botetourt was summoned to parliament by writ in 33 Edward I., and sat in parliament in pursuance of the said writ. That the said John had issue a son named Thomas, and five daughters. That the said Thomas died in the life-time of his father, leaving a son

named John, and a daughter named Joyce. — That the said John succeeded his father in the barony, having received several writs of summons, and sat in pursuance thereof, and died without issue in 9 Richard II. That the said Joyce, his sister, died without issue in 7 Henry IV., and thereupon the barony fell into abeyance amongst the five daughters of John, the first lord Botetourt.

That the petitioner was the sole heir of Catherine Berkeley, one of the said daughters of John lord Botetourt.

This petition having been referred to the house of lords, it was stated by the claimant in his printed case, that the claim made by the petition would be fully made out if the following propositions were proved: — First, that there did exist a barony of Botetourt; secondly, that it was in abeyance.

With respect to the first proposition, it was a certain rule in law that the sitting in parliament, by virtue of a writ of summons, gave a barony in fee; and it was also certain, that whoever claimed such a barony, must show, by the records of parliament, that the ancestor to whom he was heir was summoned and sat in parliament. There were two points therefore necessary to be proved.

First — That the person in whose right the barony was claimed was summoned without letters patent.

Secondly — That by virtue of that summons he was present and sat in parliament.

The first point to be proved could admit of no doubt.— There were seventeen writs of summons to John, the first lord Botetourt, and eighteen to John, the second, all which must have been without letters patent, for the last was in the 9th year of Richard II., and the oldest creation of a baron by letters patent was two years after, viz. 11 Richard II.

The second point to be proved admitted of no other evidence than the records of parliament, and certain records are there stated to show that John de Botetourt the grandfather, and John the grandson, were present and sat in the parliaments to which they were summoned. Vide infra, ch. vi.

Secondly — That this barony was in abeyance among co-

heirs, whereof the petitioner was one; which being a matter of fact, would be proved by evidence.

Journ. v.xxx. 561. The house of lords resolved that the barony of Botetourt was in abeyance, and that the petitioner was one of the coheirs of John lord Botetourt.

Idem, 572. Soon after a writ of summons was issued to Mr. Berkeley by the name of Norbourne de Botetourt, chevalier; in consequence of which he was allowed to take his place on the barons' bench, next after lord Dacres.

Barony of Howard of Walden, 1784. Printed case. Ante, § 51. § 53. Sir John Griffin Griffin petitioned his majesty in 1784 to be nominated to the barony of Howard of Walden, of the creation of which an account has been already given, as being the heir of lady Essex Griffin, who was one of the coheirs of that barony.

The attorney general (sir R. P. Arden) reported "That the said sir John Griffin Griffin had, in his opinion, proved his pedigree; and that the earl of Bristol and the petitioner appeared to him to be the coheirs of the body of Thomas lord Howard of Walden. That search having been made, it did not appear that there was any patent: that if the said Thomas lord Howard of Walden was called up to the house of peers by writ, without patent*, and sat by virtue of the same, (which as far as he could collect from the evidence laid before him appeared to be the case,) he thereby acquired an inheritance in the barony to him, and the heirs of his body; and that the same was then in abeyance between the petitioner and the earl of Bristol, in which case his majesty had an undoubted right to allow and confirm the same barony either to the earl of Bristol, or to the petitioner.

The case having been referred to the house of lords, it was there resolved that the barony of Howard of Walden was in

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* A suspicion prevailed at that time that this barony was created by letters patent; but it appears from Camden's Annals, anno 1597, that lord Thomas Howard was called to parliament by writ, his words being *Rescripto Evocatus;* and when this barony was claimed in 1691 by Elizabeth Felton, notice was given to the then earl of Suffolk, who opposed the claim, but admitted it to be a barony by writ.

abeyance, and that the petitioner was one of the coheirs of James, then last lord Howard of Walden.

Soon after this resolution, sir John Griffin Griffin was summoned to parliament, by writ, as lord Howard of Walden, and took his place and seat accordingly.

§ 54. It has been already stated that a coheirship in the barony of Ros or Roos was claimed by lady Henry Fitzgerald in 1805, upon the ground that it was a barony by writ, which had fallen into abeyance between lady Bridget and lady Frances Manners, the two daughters and coheirs of John, the fourth earl of Rutland. Barony of Roos. 1805. Printed case.

That lady Henry was one of the coheirs of lady Frances Manners, and George earl of Essex was the other; and that sir Thomas Windsor Hunloke, bart. was the sole heir of lady Bridget Manners, who was the elder sister.

The claim was opposed by the duke of Rutland, as heir male of the body of John, the fourth earl of Rutland, who contended that the barony had formerly descended to heirs male, and not to heirs general. That his claim was not affected by the award or compromise made by king James I.; for by that, the ancient barony of Roos of Hamelake, Trusbutt, and Belvoir was not given to the heir general. Ch. iv. § 56.

That the claim of the duke of Buckingham in 1666 was evidently disallowed or relinquished, and the right of the earl of Rutland as heir male fully recognized, in preference to the claims of the heirs general.

That the possession of the barony by the earls and dukes of Rutland, from the time when it was alleged in the petitioner's case, to have fallen into abeyance among the daughters of John, the fourth earl of Rutland, which was fully proved by its having been enjoyed and used by every eldest son of an earl of Rutland, and marquis of Granby, down to the then present time, constituted a sufficient title against the claims of the pretended coheirs of John, the fourth earl of Rutland. For though it was admitted that a barony which had fallen into abeyance, and had not been assumed by any person, might be claimed at any indefinite distance of time, yet it did not follow that a claim to a barony could be supported against an

Harg. Juris.Exer. v.ii. No. 1.

uninterrupted and undisputed possession, for more than a century.

The duke of Rutland was afterwards advised to contend that the barony was territorial; of which an account has been already given.

Ch. ii.

The house of lords resolved, that sir Thomas Windsor Hunloke, being the heir of lady Bridget Tyrwhitt, one of the daughters of John, the fourth earl of Rutland, and George earl of Essex, and the petitioner lady Henry Fitzgerald, being the coheirs of lady Frances Willoughby of Parham, another daughter of John, the fourth earl of Rutland, were the coheirs of Robert de Ros, and that the barony which was vested in the said Robert de Ros, remained in abeyance between the said sir T. W. Hunloke, George Earl of Essex, and lady Henry Fitzgerald.

Soon after this resolution, his majesty confirmed the barony of Roos to lady Henry Fitzgerald and the heirs of her body.

Barony of Zouch. Printed case, 1805.

§ 55. Sir Cecil Bishop, baronet, petitioned the king to be nominated to the ancient barony of Zouch of Harringworth. This petition having been referred to the house of lords, the petitioner stated that the barony of Zouch of Harringworth was a barony by writ, as appeared by several writs of summons of a date anterior to the 2 Richard II., in which year it was well known that the first instance of creating a baron by patent took place. And this point being established, it followed of course that the dignity in question would descend to the heir of the body of the person so summoned. And if there were more heirs than one, it would remain in abeyance amongst those coheirs, as long as such coheirship continued to exist, unless it should please the crown in the mean time to execute its royal prerogative, and terminate such abeyance in favor of one of the said coheirs.

That the claimant stood in the situation of one of the heirs of the body of the late lord Zouch, with this particular distinction, that he was the only male representative of that lord known to exist.

That William, the first lord Zouch of Harringworth, was a lord of parliament, by the name of William La Zouch de

Harringworth; as appeared by a writ of summons in 17 Edward II., and continued to be summoned to parliament by that title until his death; whereby a barony in fee was created descendible to heirs general,

That the title descended in the male line to Edward, the eleventh lord Zouch, who sat in several parliaments from the 23 Elizabeth to the 13 James, and died in 1625, having had issue two daughters, Elizabeth and Mary.

That the claimant was descended from Elizabeth, the eldest daughter of Edward, the eleventh lord Zouch, and was therefore one of the rightful heirs of the said barony.

The house of lords resolved that the barony of Zouch of Harringworth was a barony created by writ in the reign of king Edward II., and therefore descendible to heirs general; and that the said barony fell into abeyance upon the death of Edward, the last lord Zouch, between Zouch Tate, his grandson, being the son and heir of Elizabeth, his eldest daughter, and Mary, the wife of William Connard, esq. his youngest daughter: which said Elizabeth and Mary were the only daughters of the said lord. And that the petitioner and several other persons were the coheirs of the said Zouch Tate; and that the petitioner and certain other persons were the coheirs of the said last lord Zouch, together with the heir or heirs of the body of the said Mary, the youngest daughter of the said last lord Zouch, if the said Mary had any heir or heirs of her body then in existence: and if she had left none, such were the sole coheirs of the said last lord Zouch, and that the said barony was in abeyance among the said coheirs, and consequently was at his majesty's disposal.*

Where only one heir the abeyance terminates.

§ 56. In all cases of abeyance of dignities, whenever the coheirship determines by the death of all the daughters or sisters but one, or by the extinction of all the descendants of such daughters or sisters but one, by which there remains but one heir to the dignity, the abeyance is terminated, and the person who is the sole heir becomes entitled to the dignity. For although in consequence of the opinion of the judges in the

Ante.

* Sir Cecil Bishop was afterwards summoned to this barony.

case of the earldom of Oxford, that by the descent of a barony upon coheirs, it became so completely vested in the crown, that no person could afterwards acquire a right to it, without a grant from the crown; yet it was soon after settled, that where the coheirship ceased, and there remained only one heir, such sole heir became entitled to the dignity, as a matter of right, and not of favor from the crown.

Barony of Ogle. Collins, Appendix, No. 6.

§ 57. Sir Robert Ogle was summoned to parliament by writ in 4 Edward IV. The title descended to Cuthbert Ogle, who was summoned to parliament in 5 Elizabeth, and died in 39 Elizabeth, leaving two daughters his heirs; Joan married to Edward Talbot, a younger brother to the earl of Shrewsbury, who died without issue; and Catherine married to sir Charles Cavendish of Welbeck. Catherine having survived her sister, and being sole heir to the barony, obtained letters patent, 4 Charles I., reciting that Cuthbert Ogle was seised of the honor and dignity of baron Ogle, to him and his heirs, and that he and several of his ancestors had been summoned to parliament, and had sat in parliament with the other barons of the realm; and that Catherine was, by the death of her sister, become the sole heir of Cuthbert Ogle. *Unde evenit ut dicta Catherina adhuc superstes sit et remaneat sola et unica hæres dicti Cuthberti, nuper baronis Ogle de Ogle.*

His majesty acknowledged, granted, and confirmed to the said Catherine the barony of Ogle; to hold to her and her heirs for ever; with the same place and precedence as the former barons of Ogle.

§ 58. In the preceding case the confirmation might have been a matter of favor; and indeed an opinion seems to have prevailed at that period, and in the succeeding reign, that where a dignity fell into abeyance, it was in the power of the crown to extinguish it. This appears from the letters patent by which the barony of Lucas of Crudwell was granted to Mary countess of Kent, which were confirmed by a private act of parliament 15 Charles II., in which there is the following proviso: "That if there shall be more persons than one who shall be coheirs of her body by the said earl of Kent, whereby the king's majesty, his heirs or successors, might declare which of them he pleased to have and enjoy

the said honor, title, and dignity, or might hold the same in suspense, or extinguish the same at his and their pleasure; that nevertheless the said honor, title, and dignity should not be held in suspense, or be extinguished, but should go and should be held and enjoyed, &c."

But the doctrine that where a dignity fell into abeyance, it might be extinguished by the crown, was disallowed in the following case: —

Barony of Clifford. Collins, 306. Journ. vol. xiv. 568. 574, 575. 683.

§ 59. Thomas earl of Thanet presented a petition to the crown in 1690, stating that Robert de Clifford was summoned to parliament in 28 Edward I. as a baron, the writ being directed Roberto de Clifford: and being also summoned to several ensuing parliaments, died seised of the said title and dignity to him and his heirs as of fee and right. And his heirs, as barons Clifford, were from time to time summoned to sit in parliament by that title, till the reign of king Henry VIII., when Henry lord Clifford was created earl of Cumberland to him and the heirs male of his body; and dying thereof seised, the same descended to his grandson George, who died leaving an only daughter and heir, the lady Anne Clifford, by means whereof the title of earl of Cumberland descended to sir Francis Clifford, brother to the said George, as heir male of the body of the said Henry. So the barony of Clifford did descend to the said lady Anne Clifford as cousin and next heir to the said Robert de Clifford.

That lady Ann Clifford had issue by Richard earl of Dorset* two daughters: Margaret her eldest daughter and coheir, married to John earl of Thanet; and Isabel the younger daughter, married to James earl of Northampton, which Isabel dying in the lifetime of her mother, left issue only one daughter Alethea, married to Edward Hungerford, esquire, who survived her grandmother the lady Anne Clifford, but died the year ensuing, without issue; and the said Margaret countess of Thanet, surviving her mother, died in 1676, leav-

* This lady Anne Clifford, when countess of Dorset, twice claimed the barony of Clifford, and her petitions were referred by his majesty to the house of lords; but no resolution appears. Journ. vol. iii. p. 800., vol. xi. p. 529.

ing issue Nicholas, earl of Thanet, her son and heir, who by the death of the said lady Alethea Hungerford, his cousin german, without issue, became sole heir to his grandmother the said lady Anne Clifford, and consequently to the barony of Clifford.

Collins, 312.

That it might be objected and made a quere, whether the lady Alethea Hungerford, being the only child of Isabel, countess of Northampton, one of the two daughters and coheirs of the said lady Anne Clifford, happening to die after the decease of the said countess of Dorset, the honor, because these were two coparceners for a year or two, should not be revived for the benefit of the earl of Thanet, who was become by the death of Margaret countess of Thanet, his mother, and of the said Alethea, sole heir thereto.

In answer to which it was said, that Whitlock in his reading about 1619, had it, that an honor or title could not multiply, nor be divided, nor communicated to more than one; and therefore if a baron died having two daughters and heirs, neither of them should bear the title, but it should be lost; yet if one of them died without issue, the other should inherit the barony: and though baronies by writ, being indivisible inheritances, the king might revive the honor in the issue of either, or suffer it to lie in abeyance, or unrevived; yet when two such daughters were, and one of them died without issue before the king had disposed of the barony elsewhere, the other sister, or the issue of such other, had enjoyed the barony; and so by the reason of honor and law, of right ought to do.

Journ. vol. xiv. p. 683.

The committee of privileges resolved that Thomas earl of Thanet was the sole, lineal, and right heir to Robert de Clifford, first summoned to parliament as lord de Clifford by writ in 28 Edward I.; and that the said title and barony of lord Clifford did of right belong to the said earl of Thanet, and his heirs. To which the house agreed.

Notwithstanding this decision the same point was again discussed four years after, and finally settled in the following case: —

Barony of Willoughby de Broke.

§ 60. Sir Richard Verney claimed the barony of Broke, stating that it was originally created by a writ of summons in

7 Henry VII., directed to sir Robert Willoughby by the stile of Robert Willoughby de Broke, chevalier; who died in 18 Henry VII. That sir Robert Willoughby his son was also summoned to parliament in 1, 3, and 6 Henry VIII., and sat accordingly. That this sir Robert had one son, who died in the lifetime of his father, leaving three daughters, Elizabeth married to sir Fulk Greville, Ann who died an infant, and Blanch married to sir Francis Dawtrey, who also died without issue, by which Elizabeth became sole surviving heir to her grandfather, the last lord Willoughby de Broke. Collins, 321. Skin. Rep. 432.

That Elizabeth left issue a son, named also sir Fulk Greville, who was created lord Broke of Beauchamp Court, by king James I., to him and his heirs male, remainder to Robert Greville and his heirs male; yet was he rightfully entitled to the said barony of Broke in fee; and dying without issue, the same barony descended to Margaret lady Verney, his sister and sole heir, grandmother to the petitioner, Whereupon he prayed that he might have a writ of summons.

This case being referred to the house of peers, was there argued by sir Richard Verney's counsel, who set forth, 1. That sir Richard Willoughby was created a baron by the writ of summons. 2. That such writ of summons, and sitting thereupon, did create an estate in fee. 3. That the petitioner was lineal heir to the said barony.

Counsel being also heard on behalf of lord Broke of Beauchamp Court against the claim, agreed the pedigree; but argued, 1. That such honors ought to descend to the heirs male. 2. That either it was extinct by coming to coheirs; or 3. That if it was not extinct by descending to coheirs; yet that sir Fulk Greville's acceptance of a new patent, in tail male, of the same title, the barony in fee was thereby extinguished; and 4. That if the petitioner had a title to any barony, it was to that of Willoughby de Broke.

The attorney general (sir Edward Ward) contended, upon the authority of Prynne and Elsynge, that a writ of summons did not create an hereditary barony*; and if it did, that

* It is very singular that the attorney general and the other counsel should have been ignorant of the case of the barony of Clifton, ante.

where a baron of this kind died leaving two or more daughters, sisters, or other coheirs, the barony became vested in the crown, conformable to the opinion of the judges in the case of the earldom of Oxford. And upon this latter ground the house resolved that sir Richard Verney had no right to a summons to parliament.

A committee was appointed to draw up a report to the king, pursuant to this resolution; the chief reason for rejecting the claim appearing to be that the barony was for some time lodged in coheirs; and that therefore it was in the king's power to hold the same in suspense or abeyance; or to extinguish it. The committee was adjourned before any report was made; but in the interim several peers, as the earls of Lindsey, Thanet, Sussex, and Abingdon, the lord Delawarre, &c., who had baronies by writ in them, some whereof had at that time only daughters, looking upon themselves concerned, from what was mentioned in the committee relating to the descent of such baronies on coheirs, moved the house that a day might be appointed to consider of what had been mentioned by some lords in relation to the descent of baronies by writ. A day was appointed accordingly, and the lords above mentioned were heard by their counsel, Mr. Finch and sir Thomas Powis, It was then ordered that the attorney general (sir Edward Ward) should be likewise heard touching the said matter, who made the following argument: —

Ch. Baron Ward's Collect.

" Our books tell us, that a dignity or barony is an entire and indivisible thing, and doth not nor can descend to any one of the daughters solely. And when all have equal pretence, and no one can claim *ex debito*, it seems reasonable to think that it should be in the crown. And for this I rely upon the judgment in the great case in this house 1 Charles I., between the lord Willoughby and earl of Oxford, touching the great office of lord Chamberlain, and the baronies of Bulbeck, Sandford and Baddlesmere.

" It fell out, that by the death of John, fourth earl of Oxford, who left issue John, fifth earl of Oxford, and three daughters; and which John, the fifth earl, died without issue;

the baronies came to the three daughters, one of which married lord Latimer, another to a Wingfield, and another to a Knightley; and the five judges to whom the matter was referred, as to the baronies, gave their opinion, that these dignities being entire and indivisible, and descending upon three daughters, they became incapable of the same, otherwise than by gift from the crown, and they in strictness of law reverted unto and were in the disposition of the king. And therefore, 22d March 1625, it was resolved, upon the question, that these baronies were in his majesty's disposition.

" In the lords' certificate to the king, taking notice of the judges' opinion, after ten days' consideration, it is expressed, —' That the baronies where wholly in the king's hands, to dispose of at his pleasure.'

" Now in this case, though it doth not appear that there were any issue of any of the sisters living, yet there is little question but there were. But that which is considerable is, that the dignities being entire, and not descending to any one more than the other of the sisters, they must of necessity revert to the crown, and be in its disposition; and not be in abeyance and suspended only, as is pretended, till the crown dispose to one of the sisters, or till there happen to be a single heir of the whole family.

" It is true, it is said, 1 Inst. 165. a., that in such case of descent among daughters, the king, who is the sovereign of honor and dignity, may confer upon which of the daughters he pleases, for the uncertainty. And there it is said, that in the case of one only daughter it descends to her and her posterity, as any other inheritance; as it fell out in the case of Sampson Leonard, who married Margaret, only sister and heir of Gregory Fiennes, lord Dacre. Ante.

" Lord Coke there admits the difference between a dignity, or name of nobility, and a manor held of the king, to be high constable of England. For if such a man dies, leaving issue daughters, it shall be executed by deputy (Dyer, 285.) till the marriage of the eldest, and then by her husband. To speak of a suspension or abeyance, till it centres in one heir, are new terms not heard of before. If the barony revert to

the crown, as the judges say, and becomes in the crown's disposition, if the crown grants it away, and then the coheir's title centres all in one, can this new grant prejudice that? — yet a disposition whilst many is admitted; that shows there is no subsisting right. If liberties, privileges, franchises, &c. created by the crown, revert or come again to the crown, and they cannot subsist of themselves in the crown, as distinct privileges, then are they merged. Case of the abbot of Strata Marcella, 9 Coke's Rep. 25., and a barony reverted to the crown cannot subsist in the crown, *ergo*, it is merged in it.

" The crown, *cæteris paribus*, may have preferred sometimes the younger before the elder sister's husband, as was done in the case of lord Cromwell, who left issue divers daughters, and the king conferred the dignity upon Bourchier, who was married to the youngest, and he was called lord Cromwell. Herein is shown the right and power the crown hath to dispose, in case of more daughters than one; from all which, I hope, I may conclude with the judges' opinion, and lords' resolutions in the earl of Oxford's case, *ut supra*. 1. That two or more daughters are incapable, otherwise than by gift from the crown; and if incapable themselves, then their issue cannot be capable.

" 2. That in such case the baronies revert to the crown, and if they revert, then they do not descend; but the king, as the fountain of honor, may grant them at his pleasure, or extinguish them.

" 3. That they are in the king's power, to dispose of at his pleasure; and if at pleasure, not confined to any of his daughters, but it may be, as it hath been, to strangers.

" 4. That though all the coheirs but the issue of one, should in process of time die, that cannot restrain a barony, reverted to and in the crown's disposal; or at least it cannot make it in a better condition than when one only daughter was left; in which case, as appears from above, the crown hath otherwise disposed of it.

" 5. What may be the consequence of this doctrine? either the barony descended upon all the daughters, or it did not. If it did not, because of its entirety and indivisibleness,

then there is no point nor right. If it did descend, as one would think such as maintain the surviving issue's right should hold it did, then that rule of entirety and indivisibleness is contradicted, which is hard to do against such authorities.

" If it did not descend actually upon the father's death upon all, I cannot see how any of them can have any right, much less how the surviving issue can have all. If there was a right in all the daughters, how could the crown give it to one or to others, as hath been frequently done, even to strangers, and is admitted may be, and hath been done to any of the daughters? But the crown hath frequently given it to others; *ergo*, the daughters had no right.

" The true reason why the crown hath had a right to dispose, in case of one or more daughters, hath been, because the barony being created by writ, for a special purpose in parlialiament, the daughter or daughters could not do that service; so the crown hath disposed as above."

The counsel for the lords replied, and produced precedents, which being collected by Mr. King, Lancaster herald, were printed on that occasion, and entitled, " Baronies by writ devolving upon coheirs, enjoyed by or conferred upon the person or issue of the surviving coheir, where such person or issue became sole heir to the barony." Ch. Baron Ward's Collections.

It contains the cases of lord St. John of Basing, lord St. Amand, lord Roos, lord Bardolph, lord Coniers, Vipount lord of Westmoreland, lord Ogle, and lord Clifford; and concludes with the following observations:—

" If a barony in fee once suspended, or put in abeyance, by falling upon coheirs, cannot be taken up again without some instrument from the king to revive it; then if a baron in fee should die leaving two daughters and a brother, though one of the daughters should die ever so soon after the death of her father, yet the other daughter could not have the title but at the king's pleasure. And if both the daughters should die without issue, their father's brother will not be a peer but at the pleasure of the king. Nay, if such a baron should die leaving two daughters, and his widow with child of a son, upon the death of such baron the title will be suspended until

the son is born; and according to this rule, the son will not be a baron but at the king's pleasure, because the title was once suspended.

"The suspension in case of coheirs doth not arise from any incapacity either in the blood or in the persons of the coheirs; but only because both cannot take the barony at once; and neither of them in law is preferred before the other. Therefore of necessity the title in such a case remains in abeyance or suspense, until it be either fixed in one by the king, whilst there are several coheirs in being, or else until it is fixed in one by the law, upon her or her issue's becoming the survivor: for when the only reason of suspension is removed, the surviving daughter hath the same right as if she at first had been the sole heir. The contrary opinion to this doth tend to the extinguishment of titles and honor in such cases as may and will frequently happen; and according to this, it may often be in the king's pleasure to exclude the male descendants of barons in fee from sitting in parliament, if in the elder brother's line the title of honor should be ever suspended for the shortest time by more than one daughter."

The house ordered that the heralds should be heard as to the said precedents. The heralds were accordingly heard at the bar in relation to the descent of baronies by writ; and sir Thomas St. George, garter, made several objections to the said printed precedents, upon which Mr. King was called to prove the same, who justified them by the books and records of the herald's office. And an authentic copy of the king's recognition of the barony of Ogle in 4 Charles I. being read at the bar, and the matter being reported by the lord keeper, the question was put, —

Ante, § 57.

"Whether if a person summoned to parliament, and sitting, die leaving issue two or more daughters, who all die, one of them only leaving issue, such issue has a right to demand a summons to parliament?" And it was resolved in the affirmative.

Journ. vol. xv. 522.

§ 61. Against this resolution the following protest was entered: —

Dissentient for these reasons,

" First — Because we conceive it is more suitable to the methods of all courts of justice, and therefore particularly more proper for this supreme court, to give judgment in particular cases, when they are brought to be tried before them, than to make a general rule, which possibly may not comprehend all future accidents, and may be liable to many great inconveniences that cannot now be foreseen; and which in its nature seems to be a matter fitter to be provided for by a law than a judgment.

" Secondly. — Because there were several precedents offered to be produced, to show that the practice upon several occasions had been directly contrary to this rule. And because the heralds, who we conceive disproved the printed precedents, were not allowed time to produce precedents, to show where baronies descending to several daughters were extinguished, and new creations of those titles given to others.

" Thirdly — Because we conceive this general rule now made is in opposition to a judgment solemnly given by this house, upon hearing counsel on all sides in a particular case lately referred by the king, and is grounded upon a bare motion made by some lords, who we conceive were no way concerned in that judgment.

" Fourthly — Because this last rule does likewise seem to us to be repugnant to the judgment of this house in the case between the earl of Oxford and lord Willoughby of Eresby, then referred to this house by king Charles I., and by their lordships thought fit to be referred to the consideration of the judges, as a matter of that importance that deserved their assistance; who upon mature deliberation returned their opinion to their lordships. And the house did vote that the baronies were in his majesty's disposition: and in their report to the king did declare, that for the baronies, they were wholly in his majesty's hands, to dispose of at his own pleasure.

" Fifthly — Because we conceive that it is not in the power of this house either to explain or repeal an act of parliament, though a private act, in a judicial manner, but only

in our legislative capacity. And there being an act passed in the 15 Charles II. c. xv., for settling the lands of the earl of Ante § 58. of Kent, which disposes of the barony of Lucas of Crudwell, and declares the king's power to dispose of the barony, where more than one female, to whom or to which he pleases, or to hold in suspense, or extinguish the same; we cannot but think this vote is in direct opposition to that act.

" NORFOLK and M. and seven more peers."

§ 62. The principal objection touching the extinguishment of the barony of Broke, by reason of its descending to co-heirs, being removed, sir Richard Verney was advised to claim the barony of Willoughby de Broke, as being the more genuine interpretation of the direction of the writ to his first ancestor. He therefore again petitioned the king for the said barony; praying in general terms the peerage of his ancestor, without limiting it to any express title.

This petition being referred to the house of peers, it was there, after a long debate, resolved that the petitioner should be heard upon this new matter.

Against this resolution the following protest was entered Journ. vol. xv. p. 643. and signed by ten peers: —" Dissentient, 1. Because, as it seems to us, the petitioner's case has been already heard and adjudged, in this house, upon his former petition, whereby he claimed to have a writ of summons to parliament from the same ancestor, by the same pedigree, and under the same writ of summons by which he makes his claim in this petition.

" 2. Because the judgment given by this house upon sir Richard Verney's former petition, was not that he had no right to a writ of summons by the name of lord Broke, but generally that he had no right to a writ of summons upon his case, as stated in his petition.

" 3. Because we conceive it may tend infinitely to prejudice the judicature of this house, and to shake the security that all subjects have by the judgments of this great court, if the lords shall permit judgments once given, in so solemn a manner, to be reviewed."

Collins, 324. § 63. The principal objection touching the extinguishment

of the barony of Broke, by reason of its descending to coheirs, being removed, sir Richard Verney was advised to claim the barony of Willoughby de Broke, as being the more genuine interpretation of the direction of the writ to his first ancestor. He therefore again petitioned the king for the said barony, praying in general words the peerage of his ancestor, without limiting it to any express title.

The petitioner was heard by his counsel sir Thomas Powis and Mr. Northey, who set forth, in short, the claim to the barony of sir Robert Willoughby, summoned to parliament in 7 Henry VII., which created an estate in fee. That the petitioner was lineal heir to the said sir Robert Willoughby. That the said barony could not be extinguished so long as there was a lineal heir in being. But as to the stile or title of the said barony, it was *questio nominis*, not *rei ;* and insisted on the genuine interpretation of the writ, and showed many precedents.

In the last place, sir Thomas Powis read a list of those peers who had baronies by writ in them, included under higher titles; and also a list of those lords who then sat in the house by virtue only of original writs of summons, and by descent from baronies in fee; and a list of several noble ladies who then had such baronies in them, some of whom had been declared baronesses in parliament; and insinuated to the lords, that while he was arguing one peer into the house, the king's counsel were arguing several noble dukes and earls out of their baronies, and several sitting barons out of the house. For if a summons by writ was not an estate in fee, and descendible, then might the king choose whether he would summon these barons any more to parliament; and so would subject the peerage to great uncertainties, by being sometimes lords and sometimes commoners; and consequently destroy all their resolutions and judgments touching the descent of such baronies.

The king's counsel urged several instances of ancient times against the descent of such baronies, and argued against the operation of the writ; and that in this case it did not appear but that the first foundation of the honor might have been by

patent, or for life, or in tail male; and vouched Bromflete's case. They farther insisted, that the descent of the barony to coheirs did merge or extinguish it, or make it revert to the crown; and that it was in abeyance; by which means it was left to the clutches of the law, so as not to be taken out from thence by any person whatsoever, otherwise than by a new creation.

The petitioner's counsel replied, that the honor could not be by patent, nor by writ, with a limitation to the heirs male, for that there was issue male from each of the two sir Robert Willoughbys, who yet were not barons — insisting upon the right of the peerage in general, and that upon the true construction the title was Willoughby de Broke.

After a long debate it was resolved upon the question, without dividing, and without reporting the arguments on either side, that sir Richard Verney had a right to a writ of summons to parliament by the title of lord Willoughby de Broke.

Journ. vol. xv. 668.

A writ of summons was issued to him accordingly, and he was seated in the place of sir Robert Willoughby.

Cases of Claims by a surviving heir.

§ 64. Since this determination several claims have been made to baronies by writ, that had been in abeyance, upon the ground that the abeyance was determined, and the claimant was, by the failure of heirs of all the other coheirs, become the sole heir to the barony.

Barony of Berners. Collins, 331.

§ 65. Mrs. Catherine Bokenham claimed, in 1717, the barony of Berners; stating that sir John Bourchier, knight of the garter, was summoned to parliament in 33 Henry VI. as a baron, by a writ directed to John Bourchier de Berners, chevalier; and was likewise summoned to divers other parliaments during the reign of the said king.

That this barony descended to John Bourchier, who was also summoned to several parliaments by the title of lord Berners, and died in 1532, leaving issue Jane, his sole surviving daughter, who married Edmund Knyvet, esquire, whose grandson and heir, Thomas Knyvet, in 14 James I., claimed the said title and dignity of lord Berners; which was then adjudged to him by a report of the lords commissioners for

the office of earl marshal, but he died before the king had confirmed the report; to whom Thomas Knyvet, the petitioner's brother, was heir; who dying unmarried, left the petitioner and her sisters his coheirs. And the petitioner, by the death of all her sisters without issue of their bodies respectively, became the sole surviving heir to the aforesaid title and barony of Berners.

This petition having been referred to the house of peers, lord Clarendon reported from the committee of privileges that search had been made so far back as the reign of Edward III., whether any patent had been granted for creating sir John Bourchier a baron, but none could be found; — that there was produced a writ of summons to parliament in 33 Henry VI., directed *Johanni Bourchier* de Berners, along with several other writs directed to him; and also several writs directed to his grandson and heir. Journ. vol. xxi. 266. 339.

That the committee had inspected the journals of the house in the reign of Henry VIII., and found the name of lord Berners entered therein, as present several days. That it appeared to the committee that the petitioner was, by the death of her brothers and sisters without issue, become sole heir of sir John Bourchier, knight, first lord Berners, and was lineally descended from him.

The house resolved that the said Catherine Bokenham had a right to the said barony of Berners.*

§ 66. John Kynaston, esquire, claimed the barony of Powis, in 1731, stating that John de Cherleton was summoned to parliament by writ in 7 Edward II., and to several other parliaments; that he died in 27 Edward III., leaving a son, John, who was summoned to parliament by the name of John de Charleton de Powis. Barony of Powis. Collins, App. No. ii.

That the title descended to Edward lord Powis, who died in 1421, leaving two daughters, Joan the eldest, who married

* Lady Berners died without issue in 1745, when the barony fell into abeyance between her coheirs Elizabeth and Lucy, daughters of John Knyvet; and a petition from Robert Wilson, esq. of Didlington, the eldest coheir, and representative of the barony in right of his grandmother the said Elizabeth Knyvet, for the dignity is now pending.

sir John Grey, and Joyce, who married John lord Tiptoft; whereby the barony was in abeyance, and so continued till the attainder of John earl of Worcester, the son and heir of Joyce by lord Tiptoft; in 1470.

That sir John Grey, who was earl of Tanquerville in Normandy, had issue by Joan a son named Henry, who died in 1449, leaving issue Richard, his son and heir, and a daughter named Elizabeth, who married sir Roger Kynaston, from whom the petitioner was descended. That the said Richard Grey died in 1466, leaving John, his only son and heir six years old; and that by the attainder of the earl of Worcester, the other coheir to the barony in 1470, the barony was no longer in abeyance; the sole right being then in the said John Grey, who was summoned to parliament in 22 Edward IV., the first year after he came of age. But his line becoming extinct, the barony devolved on the descendants of Elizabeth, the sister of Richard Grey, who was father to John Grey, to whom a writ of summons had been granted; and that the said John Kynaston the petitioner was the heir general to this Elizabeth, and so entitled to the barony.

Vide Barony of Beaumont, infra.

The claim was opposed by sir Nathaniel Curzon, who stated that Richard Grey, the brother of Elizabeth, left a daughter, who married John Ludlow by whom she had two daughters, Ann married to Thomas Vernon, and Alice married to Humphrey Vernon: and that he, sir Nathaniel Curzon, was descended from Ann, and was a coheir to the barony jointly with Diana and Harriet Vernon, the heirs of Alice.

Vide ante, § 29.

The question was, whether Richard Powis had a daughter or not; for if he had a daughter, her descendants must take before the descendants of his sister.

The case was referred to the house of lords, but by reason of the death of Mr. Kynaston, no resolution was come to.

Barony of Clinton. Printed case.

§ 67. In 1794, Robert George William Trefusis claimed the barony of Clinton, stating that Edward Clinton lord Clinton was seised of the barony of Clinton by descent, in 4 & 5 Philip and Mary. And that by a resolution of the house of lords at that time, his precedence was fixed next above the lords Audeley: which he submitted was sufficient to

show that the barony of Clinton was a barony by writ, and to preclude the necessity of tracing the claimant's descent from a more remote ancestor.

That the said Edward lord Clinton was created earl of Lincoln, and the said earldom and barony descended through males to Edward earl of Lincoln, and baron Clinton, who died without issue in 1692, by which the barony of Clinton fell into abeyance among the issue of his three aunts, lady Catherine Booth, lady Arabella Rolle, and lady Margaret Boscawen.

That in 1717 the line of lady Catherine Booth became extinct; and the barony remained in abeyance between Samuel Rolle, son and heir of lady Arabella Rolle, and Hugh Fortescue, grandson and heir of the said lady Margaret Boscawen.

That in 1720 the king granted a writ of summons to Hugh Fortescue, by the title of Hugh Fortescue de Clinton, chevalier, under which he took his seat as baron Clinton; who dying without issue in 1751, Margaret his only surviving sister and heir assumed the title of baroness Clinton; but dying unmarried in 1760, the barony of Clinton devolved of right on Margaret countess of Orford, who dying without issue in 1791, the barony was devolved upon the claimant as heir to Bridget, the only sister, who left issue of the said Samuel Rolle, who died without issue.

The house resolved that the petitioner had made out his claim to the title, honor and dignity of baron Clinton. 20th Feb. 1794.

A writ of summons was soon after issued to him, and he took his seat as baron Clinton.

§ 68. In the year 1798 the marquis of Carmarthen, eldest son of the duke of Leeds, claimed the barony of Conyers: stating that William Conyers, of Hornby Castle, in the county of York, was summoned to parliament by writ in 1 Henry VIII, directed *Willo. Conyers de Conyers*, chevalier; and sat in that and divers subsequent parliaments. Barony of Conyers. Printed case.

That the dignity descended to John Conyers, who died in 1557 without issue male, by which the dignity fell into abeyance between his daughters—Ann, who married to Anthony

Kemp; Elizabeth, who married Thomas D'Arcy; and Catherine, who married John Atherton.

That Conyers D'Arcy, son of the said Elizabeth and Thomas D'Arcy, in 1741, whilst the title to the said barony was in abeyance between him and dame Ann Pennyman the heir to Catherine, Ann having died without issue, was summoned to parliament by virtue, as it was apprehended, of letters patent and restitution, after mentioned, as lord D'Arcy and Conyers, and sat in parliament in that year. And the said barony of Conyers devolved wholly upon him, on the death of the said Ann Pennyman in 1644, as being then the sole heir of the first William lord Conyers.

That it appeared from the journals of the house of lords, that the said Conyers D'Arcy took his seat in the house of lords under a patent of restitution and creation.

That although this entry in the journals mentioned only one patent, and although no patent answering the description could be then found, yet there was reason to suppose that there were two patents; one of the barony of D'Arcy, and the other of the barony of Conyers; made in pursuance of a warrant to sir Edward Herbert, then attorney general.

That the said Conyers D'Arcy died in the year 1653, leaving Conyers baron D'Arcy and Conyers his son, who was created earl of Holderness: and the dignities of earl Holderness and baron D'Arcy descended to Robert D'Arcy, who died in 1778, leaving Amelia his only child and heir, who married Francis marquis of Carmarthen, and died leaving the claimant her eldest son and heir; and who was the sole heir of the first William lord Conyers.

The attorney general reported, that as it appeared from a warrant to the attorney general in 1641, that directions were given for a patent of restitution and creation, under which Conyers D'Arcy took his seat in 1641, as lord D'Arcy and Conyers, which patent could not be produced; and inasmuch as the warrant to the attorney general in 1641, for making out the said patent, might be thought to afford ground to suppose that the said patent might have limited the dignity of Conyers to Conyers D'Arcy, and the heirs male of his body

only; and possibly to bring in question the nature of the original dignity. And as the attorney general, to whom the consideration of the petition by the mother of the claimant was referred, was of opinion that since the abeyance determined there had been no sitting in parliament which could be referred to the original title, he recommended that it should be referred to the lords in parliament.

The case was accordingly referred to the house of peers, where it was resolved that the petitioner had made out his claim to the title, honor and dignity of baron Conyers. April 27th, 1798.

§ 69. The barony of Powis was again claimed in 1800 by John Kynaston Powell, esq. as the sole heir of Elizabeth the sister of Richard Grey. But the petitioner stated that Henry Grey, earl of Tanquerville in Normandy, had enjoyed the ancient barony of Powis, being stiled *Dominus de Powys.* Barony of Powis. Printed case.

That Richard his son enjoyed the barony of Powis after him, as appeared by his being present and sitting in parliament in the seat of his ancestors the Charletons, in 33 Henry VI., by the title of *Dūs de Powis*, amongst the lords who swore fealty to that king in the great council chamber, in the presence of the king, the lords spiritual and temporal. Rot. Parl. vol. v. 282.

That as the abeyance determined in the lifetime of Henry, the petitioner, as heir to Elizabeth, the sister of Richard, and daughter of Henry, was entitled to the said barony.

The case having been referred to the house of lords, the attorney general informed the committee of privileges, that upon investigation of the claim of the petitioner before him, it was stated that there were coheirs of John earl of Worcester, stated, in the pedigree, on the part of the claimant, to have been dead in the year 1470, then alive, though it was not stated to him who they were by name: and prayed therefore that notice of the petitioner's claim might be given to them.

It was moved that notice should be given to the heirs of John earl of Worcester, stated in the pedigree to have been dead in the year 1470, that they might attend, and be heard in respect of the claim of the petitioner, if they thought fit.

The same was resolved in the affirmative. MS. Journ. June 16th, 1800.

This resolution must have been founded on the statement

of the attorney general, in conformity to his report, that Henry Grey, earl of Tanquerville in Normandy, never had the barony of Powis, but that the abeyance was determined either in favor of Richard Grey his son, who appeared from the printed rolls to have sat in parliament in 33 Henry VI., or by the writ of summons to John Grey his son in 22 Edward IV. In either of which cases the barony fell again into abeyance, by the extinction of the lineal descendants of Richard and John Grey: the writ of summons to John Grey having only determined the abeyance as to him and his descendants. So that it was proper to give notice to the heirs of the earl of Worcester of the claim, that they might have an opportunity of asserting their right to the barony.

Ante.

Vide ante, § 45.

It is highly probable that Henry and Richard Grey assumed the title of lord Powis as the descendants of the eldest sister: for in a claim which was made to this barony in the reign of queen Elizabeth by Mr. Vernon, it is stated, that Henry and Richard Grey were called lords Powis by reason of their descent from the eldest sister; and it is observable, that the doctrine of abeyance was scarce known at that period.

Ante, § 29.

Barony of Howard of Walden. 1807. Printed case.

§ 70. Sir John Griffin Griffin, in whose favor the abeyance of the barony of Howard of Walden was terminated in 1784, having died without issue, and there being a complete failure of heirs of lady Essex Griffin, the coheir under whom he derived — the barony was claimed in 1807 by Charles Augustus Ellis, an infant, as the sole heir of lady Elizabeth Felton, the other coheir, being the grandson and heir of the last earl of Bristol.

After some discussion respecting the original creation of the barony, and the effect of the resolution made in 1784 upon the claim of sir John Griffin Griffin, which will be stated in the next chapter, it was resolved that the petitioner had made out his claim to the title of lord Howard of Walden.

Barony of Hastings.

§ 71. Francis earl Moira claimed the barony of Hastings in 1809, stating that he was the sole heir general of William, the first baron Hastings, who was called to parliament by writ of summons in 1 Edward IV.

The attorney general (sir V. Gibbs) reported, that from

the close roll of 1 Edward IV. it appeared that a writ of summons was addressed *Willo Hastynges Militi Dno Hastynges de Hastynges.* That from the close roll of 2 Edward IV. it appeared that a writ of summons was addressed *Willo Hastynges, chevalier.* That from the close roll of 22 Edward IV. it appeared that a writ of summons was addressed *Willo Hastynges;* and by the same roll it also appeared that a writ of summons was addressed to Edward Hastyngs de Hungerford, the son of the said William de Hastyngs; and which issued in his father's lifetime, in right of his wife Mary, the sole child of sir Thomas Hungerford, knight.

That it appeared from the printed rolls of parliament, vol. v. p. 461., that le sieur de Hastings was one of the triers of petitions; and in page 496. of the same volume, 3 Edward IV., he appeared to have been again appointed a trier of petitions; and by the sixth volume of the said printed rolls, page 3., 12 & 13 Edward IV., le sieur de Hastynges is mentioned as a trier of petitions; and in page 234. of the same volume, it appeared, that on the 3d of July 11 Edward IV. he took the oaths of allegiance and fidelity to Edward prince of Wales; and again, in the same volume, page 196., in the parliament held 23 Edward IV. le sieur de Hastings is appointed a trier of petitions.

That a search having been made for the inrolment of a patent in the tower, where patents in and before the reign of king Edward IV. were preserved, no inrolment could be found of a patent of creation of William Hastyngs baron Hastyngs.

That the evidence above stated sufficiently showed the said William Hastings was called to parliament by writ of summons in 1 Edward IV., and took his seat accordingly.

That William baron Hastings died in 1483, leaving Edward Hastings, lord Hastings of Hungerford, his son and heir; and that it appeared from the close rolls of 3, 7 & 12 Henry VII. that a writ was directed in each of those years *Edwardo de Hastyngs de Hungerford, chevalier,* summoning him to parliament.

That it appeared from the sixth volume of the printed rolls of parliament, page 287., that Edward lord Hastings, among other lords, took the oath in the house of lords, not to receive, aid, or comfort a murderer, &c.; and in page 510., 12 Henry VII., le sieur de Hastyngs appeared to have been a trier of petitions. And again, in page 521., he is named a trier of petitions.

That Edward, the second baron Hastings, died about the year 1506, and was succeeded by George Hastings, his only son, who appeared from the close roll of 1 Henry VIII. to have been summoned to parliament by the name of George Hastings de Hastings; and the printed Journals, vol. I. page 4., showed that he sat in parliament under that writ.

That the said George lord Hastings was created earl of Huntingdon in 21 Henry VIII. by letters patent, in which he is described *Georgius Hastings Miles et Dominus Hastings*; to hold the same dignity to him and the heirs male of his body.

That the said barony passed in a regular course of descent to Francis the last earl of Huntingdon; and upon his death descended to Elizabeth countess of Moira, his sister and heir general, and also the heir general of William the first baron Hastings. And that upon the death of the said Elizabeth, the said barony descended to the claimant as her son and heir, and consequently the heir of the said William, the first baron; and that he was clearly entitled to the said barony.

A writ was issued to him accordingly, and he took his seat as baron Hastings.

Attainder of one of two coheirs does not determine the abeyance,

§ 72. It has been held by the house of lords, in a modern case, in consequence of the opinion of the judges, that where a barony was in abeyance between two persons, the attainder of one of them for high treason did not determine the abeyance, so as to give to the other coheir a right to the enjoyment of the barony.

Barony of Beaumont, Printed case, Dom. Proc. 1794-5.

§ 73. Thomas Stapleton, of Carleton, in the county of York, esquire, claimed the barony of Beaumont, and stated, that Henry de Beaumont was summoned to parliament in the second, third, fourth, and several other years of the reign of

Edward II., and sat in parliament. That the barony of Beaumont descended to William lord Beaumont, who died 24 Henry VII. without children, leaving an only sister, Joan. That the said Joan married John lord Lovell, and had issue a son, who died without issue, and two daughters; Joan, who married sir Brian Stapleton, to whom the claimant was heir at law, and Fridewide, who married sir Edward Norris, by whom she had two sons; sir John Norris who died without issue, and Henry Norris, who was attainted of high treason in 27 Henry VIII., and from whom the earl of Abingdon was lineally descended.

That upon the death of sir John Norris without issue, the abeyance in the barony of Beaumont ceased; and the whole right and claim to the same vested in the heirs of Joan, the eldest sister. That the petitioner was the heir general of Henry de Beaumont, who was first summoned to parliament; and therefore apprehended, and was advised, that he had a legal claim to the said barony.

This petition was referred to the attorney general (sir John Scott), who reported, "That an important question arose, whether, by the attainder of Henry Norris, the abeyance was determined, and the heirs of the eldest sister exclusively entitled by descent to the barony of Beaumont, by reason of the incapacity of Henry Norris's heirs thereby created, to claim through him? Upon this point he humbly certified to his majesty, that he had not been able to find any satisfactory determination: and, inasmuch as this point materially affected his majesty's royal prerogative, and the principles of law with respect to the descent of honors and dignities, he humbly presumed to submit to his majesty; that, before any act was done pursuant to the prayer of the petition, it might be fitting to refer the whole matter of the petition to the house of peers."

The petition having been referred to the house of peers, it was contended by Mr. Stapleton's counsel, that the coheirship was determined by the attainder; and that the case of Charleton lord Powis was in point.

In that case lord Powis died seised of the barony of Powis, which was created by writ, leaving two daughters; Joan, mar- Collins, 398. Antè § 69.

ried to sir John Grey, and Joyce, married to lord Tiptoft. Joyce left issue a son, John lord Tiptoft, who was created earl of Worcester, and was attainted of high treason, and executed 10 Edward IV.; Joan had issue a son, Henry, who left issue a son, Richard, who left issue a son, John. Neither Henry nor Richard were ever summoned to parliament; but John, who was ten years old when the earl of Worcester was attainted, was summoned to parliament 22 Edward IV. by the title of John de Grey de Powis. And in this case it could not be said that John de Grey had the barony by favor of the crown; because he was summoned to the first parliament which was holden after the attainder of the earl of Worcester, and his attaining the age of twenty-one years; when it could not be supposed he had done any service to his king and country to merit such a favor.

The lords referred a question of law to the judges, viz. "Whether, supposing the claimant to have proved himself one of the coheirs of the body of Henry de Beaumont, and supposing a barony to have been created in the said Henry, and the heirs of his body, the claimant was then entitled of right to such barony, according to the state of the pedigree last delivered in on his part?"

On the twenty-fifth day of June, 1795, the lord chief justice of the common pleas (Eyre) delivered the following opinion of the judges on this point, after stating the question in the precise form in which it appears above:*

"My lords, the attorney general, on the part of the crown, summed up his objections to the claim in a very few words. He said he opposed the claim on this single point, that the claimant, Mr. Stapleton, was not the heir of Henry de Beaumont; that it was not enough that he might be a part, a moiety for instance, of the heir; that he must have the complete character in him. Your lordships' question supposes Mr. Stapleton to have sufficiently made out his pedigree, and that he is to be taken to be one of the coheirs.

"Coheirs derive to themselves title to the inheritance of their

* From a manuscript in his own hand writing; for the use of which I am indebted to the kindness of sir Thomas Plumer.

ancestor, by descent; they are heir to the ancestor. — Our books (in particular sir Edward Coke's Comment on Littleton's Section of Coparceners) points out the manner in which they claim. They are altogether *unus hæres, unum corpus;* their heirship is *unitas juris;* the whole body of the coheirs, however numerous, must unite to constitute the heir.

" To illustrate this doctrine, sir Edward Coke puts the case of the inheritance of coheirs sued for in our courts; he says, they must all join in a *præcipe*, for they all make but one heir. He puts another case of coheirs, claiming to take under a limitation to the right heirs of A; and he states the law to be, that one of the coheirs standing alone cannot take any thing; for he is not the right heir of A. The case, as he puts it, is a particular one; and in its circumstances approaches towards the case now under consideration. But I choose to disentangle it, in this part of the argument, of those circumstances, and state it simply as an authority, that one coheir does not come within the description of heir, and cannot claim as heir.

" Coheirs hold in coparcenary: they are called coparceners, because they participate in one inheritance, derived to them by one title; though they participate, our books say, no man doth know his part in severalty. They therefore occupy that which is capable of occupation in common; but though no one knows his part in severalty, yet each man's quantity of interest in the whole inheritance is well known; for instance, if he is one of two coheirs, he is entitled to a moiety; if one of three, to a third, and so on: and if the subject of the inheritance is in its nature partible, lands for instance, he may sue out his writ of partition, and make division of the subject into moieties, thirds, &c., as the case shall be. And when that is done, instead of participating in one inheritance, each coparcener takes the part allotted to him in severalty. He then loses his character of coparcener, and becomes sole owner of the part allotted to him; but it must be remembered, that the effect and operation of this partition pursues the nature of his original right in the whole inheritance; he has still but a part of it, though he holds it in a different manner. This operation of partition is of necessity confined to inheritances, the subject

of which is in its nature partible: it applies not to inheritances in their nature impartible. Coheirs must therefore continue to hold such inheritances for ever, in the same manner as they held partible inheritances before partition; with this difference only, that the law has provided certain means, adapted to the nature of some impartible inheritances, for enabling coheirs to hold them in coparcenary, with benefit and advantage to the whole body of the coheirs; and with due regard to the quantity of interest each of the coheirs may claim in the inheritance.

"Thus, the coheirs of an advowson present by turns; and the castle goes to the elder coheir, she making compensation to the others: and other instances might be mentioned.

"A peerage is a most transcendant honor and dignity; but it is still in the eye of the law an inheritance; and it will descend to coheirs in the same manner as other hereditaments do descend. The title of the coheirs of a barony is that of *unus hæres, unum corpus;* it is *unitas juris;* they must take it, and it must vest in them as the heir of the ancestor. This inheritance stands at the head of the class of inheritances in their nature impartible; but it is an inheritance of such a nature, producing fruits of dignity, and of public duty, individual and incommunicable by any of the common means which the law has provided for the enjoyment of impartible inheritances; so that when it happens to vest in coheirs, it necessarily falls into a dormant state. No single coheir can assert a claim to it, for such a claim would be contrary to his interest: he does but participate in the inheritance, he can therefore sustain no claim to the whole of it. And this inheritance is so singularly circumstanced, that even then the whole body of the coheirs can assert no claim to it, because they are incapable of possessing, or in any manner enjoying it.

"When this inheritance is in this dormant state, it is said to be in abeyance; not in the ordinary sense of the term, as was observed by Mr. attorney general, in which it is applied to an estate in fee simple, or freehold in suspense, floating, fixing no where, and vesting in no one; but it simply denotes that the title to a barony, which has descended upon and is

vested in coheirs, remains in them in an inactive and dormant state, incapable of being asserted or being enjoyed. That none of the ordinary means provided by law for making impartible inheritances productive to coheirs, could be applied to this inheritance. One remedy, and one only, has been provided by law for the case of a dormant peerage, it is *sui juris*, of a most extraordinary nature, but very suitable to the dignity of the subject to which it is applied: I mean the prerogative right of calling one of the coparceners, by writ of summons, to sit in the seat of his ancestor. He will from thenceforth be in the exclusive possession and enjoyment of the inheritance, and will hold it to him and the heirs of his body; yet still he is but one of the coheirs of his ancestor, and the rest of the coheirs still remain coheirs. And in the event of the failure of heirs of the body of that coheir whom the prerogative hath thus preferred, the other coheir (if but one) would take the whole inheritance; or if there were more than one, the barony would again fall into abeyance.

" I have stated what I take to be the true nature of this abeyance of a barony. It falls into abeyance, because, in point of right, no one coheir can sustain a claim to it; and because all the coheirs together, though they constitute the complete heir to the ancestor, cannot claim it with effect, and therefore cannot claim it at all. The effect of the prerogative right of calling one of the coheirs to sit in the seat of his ancestor is, not to change the nature of his original title to participate in the inheritance; nor does it in any manner enlarge the quantity of his interest in the inheritance as it stood originally: it takes nothing from the title of the other coheirs, it does not attract their portion of the heirship, and unite it with that of the coheir preferred, but it creates a title to sit in the seat of the ancestor, in a great degree collateral to the title by inheritance. The prerogative is only restricted to issue the writ of summons to one of the persons who has part or share in that title: the interposition of the prerogative is, as I have before observed, *sui juris*, entrusted to the crown, in order to qualify the necessary consequences of the law of descent to coheirs, as applied to the inheritance of a barony; and, I apprehend,

it proceeds upon the ground of the law being as I have stated it to be. It was with great ability, and very ingeniously, turned by the counsel for the claimant, and used to qualify the law of descents itself, instead of the effects of the law, It was not denied, that in general many coheirs make but one coheir, but it was said that this would be an inconvenient and an absurd doctrine, as applied to a barony: that the coheirs of a barony were all of the blood of the ancestor, and must all be capable of the honor, and of sitting in the seat of the ancestor, inasmuch as the king, by his prerogative, could prefer any one of the coheirs, and place him in the seat of his ancestor; that there were therefore, in the coheirs of a barony, a plurality of persons, all capable of succeeding to the dignity; and that they were therefore, in effect, a plurality of heirs. Upon this they proceeded to erect their fabric.

" A barony, say they, falls into abeyance only because there is a plurality of heirs, capable of taking the peerage; and the law knows not how to select one from amongst them. But this is the office of the *pater patriæ*, entrusted to the crown, so long as the necessity exists; and the necessity exists so long as the plurality exists. That, as the law abhors abeyance, the moment the plurality of persons capable of sustaining the dignity is by any means removed, and only one of the coheirs thus capable of sustaining the dignity is left, the barony is no longer in abeyance; the crown no longer finds any thing upon which the prerogative can act: and, if the barony is neither in abeyance nor extinct, it must rest in the single coheir, who is thus left without a competitor. If they had built upon solid foundations, it might have been necessary to have gone farther into this case, in order to see whether the plurality they speak of has been removed, and to have examined with care the actual situation of the other branch of this noble family, the Norris branch; to have considered it as it stood on the death of sir John Norris without issue, which is the moment when the sole right of this barony is supposed to have vested in the ancestor of the claimant. The situation of the Norris branch, after the act of parliament had passed for restoring the issue of Henry Norris in blood, and the possible situation of the

Norris branch, supposing the issue of Henry (who was attainted) hereafter to fail, and the issue of his sisters to continue: out of this examination many questions of grave and weighty consideration would arise; and they would require more time for a satisfactory discussion of them, than at this period of the session of parliament could probably have been spared.

" Your lordships might possibly entertain a doubt with regard to these questions, as well as to another question; namely, whether the title to a barony can survive, when it is become impossible that all the component parts of it can vest in one person. Your lordships may entertain a doubt, whether, as to questions of this nature, there are the proper parties before you whom these questions do in point of inheritance concern. But, my lords, upon the best consideration we could give to the case now in judgment, we humbly offer it to your lordships, as our clear opinion, that the argument in support of the plaintiff's title is fallacious: and he being but a coheir, his claim to be solely entitled to this barony, as it has been made for him, is unfounded.

" My lords, the nature of the prerogative right infers no capacity in the coheir. The prerogative is, on the contrary, a provision for the incapacity of the coheir. There is no plurality of persons capable: the plurality is of persons incapable, either standing alone, or even uniting: the abeyance is not produced by the law not knowing how to select from among capable persons. The abeyance is because there is no one capable, and also because all are incapable; abeyance cannot determine by the removal of a plurality of persons capable, because such a plurality never existed. Abeyance determines by uniting all the detached parts of the title in one, and by that means restoring to the title activity and capacity to be possessed and enjoyed. And, unless the claimant could make out, that the effect of the actual situation of the other coheir, at the period he has chosen to fix upon, namely, the death of sir John Norris without issue, was such, that all the component parts of the title of heirship did unite in this claimant, he can never take this barony out of abeyance by his own

strength, or sustain a claim to be solely entitled to it. — This is the ground upon which the attorney general stood, and we apprehend he has sustained it.

" In this case we have not derived much assistance from authorities or precedents. The case of the barony of Powis was mentioned, and seemed to approach this. We must call that case to the consideration of your lordships from your journals; not being informed of the particular grounds of law on which it proceeded. I will mention one case from Coke upon Littleton. Supposing this barony not to be extinct (concerning which we are not called upon to deliver our opinion), and the present claimant be a coheir, let the situation of the other coheir be whatever the counsel for the claimant would wish it to be (except that there is no failure of issue *naturaliter*), the effect of which might be, that the title of that coheir would run upwards to the common ancestor, and from thence fall down in the course of the descent of the Stapleton line, and unite with their title in the person of the claimant; I conceive that one of the cases mentioned by sir Edward Coke, and upon which the claimant's counsel relied for another purpose, proves, that the claimant cannot make title to the whole inheritance. Sir Edward Coke on the authority of *Fleta* says, if a man be seised of lands in fee, and has issue two daughters, and one of the daughters is attainted of felony, the father dies, both daughters being alive; the one moiety shall descend to the one daughter, and the other shall escheat. It was argued on the part of the claimant, that though one coheir could not make himself complete heir, to take under a limitation in the case of descent, the law was more favorable to coheirs. And it is so; but let the extent of the favor be marked: in the case put, the law pays attention to the real interest of the coheir, and gives it effect by allowing, in the case of two coheirs and one attainted, where the attainder prevented the lands from descending in coparcenary, that part of the inheritance which fairly belonged to the other coheir to descend upon her in the determinate form of an undivided moiety; which proves, that she remained in the contemplation of the law but a coheir, entitled only to participate in the inherit-

ance, as she would have done if her sister had not been attainted. And the utmost favor that could be found, was to give her the benefit of that participation, in the only way in which she could take it: for, according to the case of Royston *v.* Reading, reported by Mr. serjeant Salkeld, page 242., there can be no such descent as the descent of a moiety to one coparcener as heir; which affirms the general rule of law upon which the whole argument rests, that the title of coheirs must in some manner or other unite, in order to entitle any one coheir to claim as heir to the ancestor.

"I forbear troubling your lordships farther: the answer which the judges submit to your lordships is, that supposing the claimant to have proved himself to be one of the coheirs of the barony of Beaumont, he is not entitled of right to such barony, according to the state of the pedigree last delivered in on his part."

The house of lords resolved and adjudged, "That it did not appear that the petitioner was then entitled to the honor, title and dignity of baron Beaumont." 26 June, 1795.

§ 74. Mr. Stapleton presented another petition to his majesty, representing, that having established by evidence that he was the sole heir of Joan lady Stapleton, and one of the coheirs of Henry, first baron Beaumont; and that, though not exclusively entitled to the said barony, he had proved himself to be one of the rightful heirs of the said barony. But, the said barony being in abeyance, the same was in his majesty's disposal; the petitioner therefore prayed, that his majesty would be graciously pleased to declare, allow and confirm to him and his heirs the said barony of Beaumont. Printed case, 1796.

This petition was also referred to the attorney general and afterwards to the house of lords; where it was resolved by the committee of privileges, that the barony of Beaumont was vested in William viscount Beaumont, by descent from his father, John lord Beaumont, who was summoned to and sat in parliament 11 Henry VI., as a barony in fee; that the said barony remained in abeyance between the coheirs of the said

William, descended from his sister Joan; and that the petitioner was one of those coheirs.*

Descent of Dignities conferred by Writ on the eldest Sons of Peers.

§ 75. With respect to baronies created by writs of summons to the eldest sons of peers, by the names of baronies vested in their fathers, it has been determined that they are hereditary in the blood of the persons so summoned, and descendible to their heirs. And therefore that where the eldest son of a peer is called up to the house of lords by writ, and takes his seat, and dies in the lifetime of his father, the dignity will descend to his son.

Barony of Clifford of Launsburg. Journ. vol. xxv. 11. 39. 1694.

§ 76. The barony of Clifford of Launsburg was granted by letters patent to the earl of Cork and the heirs male of his body; and afterwards he was created earl of Burlington.

Charles Boyle, his eldest son, was called up to parliament by the title of lord Clifford of Launsburg, by writ of summons in his father's lifetime; and having taken his seat, died, leaving a son, who claimed to be entitled to the said barony to which his father had been called, and living his grandfather. "The lord president reported from the lord's committee for privileges, to whom it was referred to consider, whether if a lord, called by writ into the father's barony, shall happen to die in the lifetime of his father, the son of that lord so called be a peer, and hath right to demand his writ of summons.

"That their lordships find no precedent in this case.

"A debate arising whether Charles lord Clifford, son and heir of Charles late lord Clifford of Launsburg, deceased, who was called by writ to parliament in the lifetime of his father, the present earl of Burlington, hath right to sit in parliament,

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* Notwithstanding the respect which is justly due to the very learned opinion of the judges in this case, yet it may be observed that as the doctrine of abeyance was originally founded on the impartible or indivisible nature of a dignity; and as all power of inheriting the barony of Beaumont by one of the coheirs is destroyed by the attainder, by which Mr. Stapleton is become the only person capable of enjoying it; he must be allowed to have a stronger claim on the crown for a confirmation of the dignity, than perhaps ever existed in a coheir to a barony.

" This house was of opinion that the said Charles now lord Clifford hath a right to a writ of summons to parliament, as lord Clifford of Launsburg."

Lord Clifford took his seat accordingly.

§ 77. Where a writ of summons is issued to the eldest son of a peer, by the name of a barony not vested in his father, it operates as a new creation of a barony; and makes it descendible to all the lineal heirs male and female of the person so summoned.

Barony of Strange. Printed case, 1736. Journ. vol. xxv. 11.

§ 78. In the third year of king Charles I., James the eldest son of William earl of Derby was called up to the house of lords by a writ of summons, directed *Jacobo Strange, chevalier;* and was seated in the place of the ancient barons of Strange of Knockin, though the barony was not in his father.

This title descended to William earl of Derby, who died without issue, in 1735.

James duke of Athol, who was the heir general of the last named William earl of Derby, claimed, in 1736, the barony of Strange, created by this writ of summons; and upon a reference to the house of lords stated the following case: —

That his majesty king Henry VII. created Thomas lord Stanley earl of Derby to him and the heirs male of his body.

That the same title and dignity came by mesne descents to Ferdinando earl of Derby, who died seised thereof to him and the heirs male of the body of the said Thomas, leaving three daughters and no son.

That the said Ferdinando did not die seised of any title or dignity of a baron, created by letters patent.

That the title and dignity of earl of Derby came to William, brother of the said Ferdinando, as heir male of the body of the said Thomas; but the said William never was seised of the title or dignity of a baron.

That James, the petitioner's ancestor, whose heir he was, eldest son of the said William, was summoned to parliament in 3 Charles I., as a baron; the writ being directed Jacobo Strange, chevalier; and sat and voted by the said title in the lifetime of his father.

That upon the death of the said William earl of Derby, the said James lord Strange succeeded to the title of earl of Derby, and died seised thereof, and also of the barony of Strange.

That the said title of lord Strange came by mesne descents to the late earl of Derby, who died in 1735, and that the petitioner was cousin and next heir to the said late earl of Derby, and great-grandson and sole heir of the said James lord Strange; and consequently entitled to the dignity of a baron, created by the writ of summons, in virtue of which the said lord Strange sat and voted in parliament.

That the following propositions might either in point of fact be so easily proved, or were in point of law so clearly established, that it was thought they could not be controverted.

First — That the said James was summoned, without letters patent, by the name of James Strange, chevalier, and sat in parliament.

Secondly — That the duke of Athol was great grandson and sole heir of the said lord Strange.

1 Inst. 9. b. 16. b. Thirdly — That the sitting in parliament by virtue of a writ of summons, without letters patent gives a barony in fee.

12 Rep. 70. Fourthly — That where there is no creation by letters patent, if issue be joined in any question, whether a man be a baron or not, he need only show that he or his ancestor, to whom he is lineal heir, was summoned and sat in parliament, which is to be proved by the records of parliament.

Fifthly — That there might be different titles of honor of the same name; for peerages, though called baronies, in imitation of the local baronies to which they succeeded, were mere personal dignities inherent in the blood of the person ennobled; and there was no legal objection to the king's summoning two men to parliament by the same surname.

These propositions, which it was thought could not be disputed, being admitted, it followed by undeniable and necessary consequence, that if the said James lord Strange

was summoned and sat in parliament, which must be granted because it appeared by the record, his lineal heir had the barony and dignity created by his summons and sitting.

The only objection which had been framed was, that the heralds ranked the lord Strange in the place of the ancient barons of Strange of Knockin: from hence two arguments were drawn. First — That the said James had no right by descent to the old barony of Strange of Knockin, because that descended to the three daughters and coheiresses of the said Ferdinando; and the writ of summons directed to him by the name of James Strange, chevalier, could not operate as a new creation, because he was not ranked as puisne baron, but took an ancient place, contrary to the statute 31 Henry VIII. c. 10.

First — The king's writ of summons gives the person summoned a right to sit in parliament. His rank and precedence is a matter merely collateral, of which the heralds take upon them to be judges in the first instance; and if any question arises upon the place given by the heralds, it is to be decided by the lords of parliament, in the house of lords, as a matter of privilege; whereas the right of peerage itself the lords never have judged, but upon a reference by the crown. When there is a doubt in what place a lord who brings a writ of summons should be ranked, his writ of summons giving him an undoubted right of peerage and title to sit and vote in parliament, he is immediately admitted to some place, with a *salvo jure;* and the usage is, afterwards to appoint a committee to consider of his precedency.

Secondly — Either the heralds ranked the lord Strange in the place where the last son of the Derby family summoned to parliament was placed, merely of their own accord, through ignorance or negligence, or they had some direction from the crown for so doing. If the lord Strange was ranked above all the barons of whom the ancient barons of Strange took place, by virtue of some direction from the crown; this prerogative the crown in fact often assumed, notwithstanding the statute 31 Henry VIII., and sometimes exercised with the approbation of the house of lords: and when the lords com-

plained of it, they only objected to the precedency which was given contrary to law, and never thought the peer's right of sitting could be questioned, because he was marshalled in a higher place than he was by law entitled unto. If it was singly the act of the heralds, their mistake, carelessness or ignorance of the law could no more prejudice the right of the lord Strange, in virtue of his writ of summons, than it could injure the daughters and coheiresses of Ferdinando earl of Derby. It might serve to show their error of judgment, or want of exactness, but could not influence or control the operation of the king's writ. The writ of summons by which the eldest son of a peer is called into his father's barony, must operate as a new creation of some sort, until the old title descends. And therefore the eldest son and heir of the lord Clifford, who was eldest son and heir apparent of the earl of Burlington, and called by writ into his father's barony, was upon the death of his father adjudged by the house of lords to have a right to a writ of summons, by virtue of his father's writ. Yet the heralds did not rank the lord Clifford as puisne baron, but gave him the place of his father's barony; and to that day the heralds marshalled all peers called by writ into their fathers' baronies, according to the place of those baronies.

Ante § 76.

The house of lords had often doubted, whether this precedency given by the heralds was not contrary to law: but there never was an imagination, that if the peers called by writ into their fathers' baronies were wrong placed by the heralds, they therefore had no right to sit at all. Had the barons above whom the lord Strange was placed, objected at the time to the precedence given him by the heralds, the only question would have been, in what place he should sit, and not whether he had a right to sit at all, which he was unquestionably entitled to, by virtue of his writ of summons; and in consequence of his having sat, his blood was ennobled, and a barony descended to his heirs. What place or precedence belonged to that barony was a matter of privilege, and might be taken up and determined at any time by the house of lords; but could never come in question upon any issue joined whe-

ther the lineal heir of the said lord Strange was a baron or no baron.

Secondly — But in the next place it was said, though the rank given by the heralds to the lord Strange could not take from him his right to sit and vote as a lord of parliament, by virtue of the king's writ; yet it was to be looked upon as an evidence that the king thought the old barony of Strange of Knockin was in William earl of Derby, and *intended* to summon the lord Strange into his father's barony; and therefore, William earl of Derby having no barony into which his son could be summoned, the king was *deceived.*

First— Neither the king, nor they who advised him, could possibly think that the old barony of Strange, enjoyed by the former earls of Derby, had descended to William: because it had been solemnly settled but two or three years before by the house of lords, after hearing the judges in a case between the earl of Oxford and lord Willoughby of Eresby, that when baronies in fee had been enjoyed along with an earldom, the descent of the earldom to the collateral heir male, did not attract or draw after it the barony from the heirs general.

As to the fact it was well known that the said Ferdinando had left three daughters. Several acts of parliament had been made to settle differences between them and their uncle; and seven months before the lord Strange took his place, the following entry was made in the journals of the house of lords: — "The lord president declared to the house, that his majesty hath granted his writ of summons to this parliament unto James, the son and heir apparent of William, now earl of Derby, by the name of James Strange, chevalier; and that the heralds have ranked the said James in the place of the ancient barons of Strange. And his lordship shewed that Anne countess of Castlehaven, the eldest daughter, and one of the coheirs of Ferdinando, late earl of Derby, deceased, doth claim the name and title of the said barony of Strange; whereupon it is this day ordered the said writ of summons, and the said rank and place of the said James shall be no way prejudicial unto the right and claim of the said Anne countess of Castlehaven, nor unto any of the rights and claims of the

1628. Journ. v. iii. 841.

daughters and coheirs of the said Ferdinando, late earl of Derby, deceased."

Upon this entry many observations might be made.—First, That William earl of Derby, as in law he could not, so in fact he did not claim the old barony of Strange; for if he had, his claim would certainly have been mentioned in the journal; and that the king had called the son into his father's barony, or a barony supposed to be in him.

Secondly — That the lords were clearly of opinion, either that the king could not give the old barony which was in abeyance, to the lord Strange, (and that they understood the resolution the house had come to, two or three years before, that baronies in abeyance were wholly in his majesty's hands, to dispose of at his majesty's pleasure; to mean, as it had since been construed, that the king might give them to which of the coheiresses he pleased, but not to a stranger,) or else that the king did not intend to give away from the coheiresses the old barony of Strange: for had their lordships thought that the king could, agreeable to the unanimous opinion of the house of lords, assisted by the judges, so deliberately and so solemnly given but two or three years before, have granted this old barony to whom he pleased, and that he actually intended to grant it to the said James by writ of summons, they would not have made an entry, saving that barony to the coheiresses, without so much as hearing the lord Strange, or any counsel on behalf of the crown. But upon a supposition that the crown did not intend to dispose of the old barony, it was very reasonable to enter into a declaration, that the writ which summoned the said James by the name of Strange, should no way prejudice the right of the coheiresses to the old barony of Strange.

Thirdly — A writ of summons might be countermanded by the king, by a supersedeas before the sitting in parliament. The lord Strange did not sit in parliament until the twentieth of January, 1628, which was seven months after the above entry was made; and therefore if the king had only intended to call the said James into a barony of Strange which he thought belonged to his father, there was time enough to su-

persede the writ of summons, after it appeared, by a public entry in the journals of the house of lords that no such barony did belong to the said William earl of Derby, but had descended to the three daughters and coheiresses of the said Ferdinando: and the writ not having been superseded, it was manifest the crown was not deceived, but knew of the right of the coheiresses, and did not intend to prejudice it.

Fourthly — The lords of parliament, after they knew that William earl of Derby had no right to the old barony of Strange of Knockin, and that the crown did not pretend to deprive the coheiresses of the said Ferdinando of the said barony, thought a writ of summons directed to the said James by the name of Strange, sufficient to entitle him to sit in parliament, and he was accordingly received without the least opposition.

That no notice was taken of the precedence given him by the heralds was not to be wondered at, because no complaint was made by the lords over whom he was placed, which might be owing to a respect paid him on account of the great family he represented, and the high title to which he was soon to succeed.

Secondly — The particular motive which induced the king to summon the lord Strange did not appear upon the writ of summons, and therefore it could not be known that he was deceived: but whatever the king's intention was, if the lord Strange was summoned and sat, his blood was ennobled, and a barony descended to his heirs. A writ of summons might be countermanded before the person summoned sat: after he had sat, there was no way to vacate or repeal it, upon any pretence or suggestion whatsoever. — The state, title, and dignity of a baron was the legal consequence of once sitting, without letters patent. Where the question in any court of judicature was, baron or no baron, (where there was no creation by letters patent), it must be tried by the records of parliament, where all that appeared was, whether the person who claimed to be a baron sat or not: if he sat he was a baron, if he never sat he was no baron.

The lord Delawarre was created by writ of summons, the Ch. iv § 52.

writ being directed *Thomæ West Delawarre, chevalier.* After his death, Thomas his son was called to divers parliaments in the same manner. By act of parliament for divers causes mentioned in the said act, it was enacted that William, son and heir of George, brother and heir of Thomas, son and heir of Thomas lord Delawarre first summoned, during his life, should be disabled to claim or enjoy any dignity or lordship in any right, estate, &c. by descent, remainder, or otherwise. After passing this act, the said Thomas, son of Thomas, died. Queen Elizabeth called the said William to parliament, the writ being directed *Willielmo West Delawarre, chevalier.* The writ must have been so directed, had he been summoned in right of descent to his grandfather; but no objection was made that the queen intended to call him to that barony, which he was disabled to take; that the old title of Delawarre was, during his life, in abeyance; and that the queen could not give him a new barony, by the very same name. Since he was called to parliament by writ, it must operate as it might: he had no right by descent, and therefore the writ gave him by creation a new barony of Delawarre, which descended to his son Thomas, who was likewise entitled to the old one. And upon a question referred to the house of lords, 39 Elizabeth, whether he should be ranked according to the old or new barony of Delawarre, it was adjudged that he had a right to the place of the old barony. Had the heralds ranked the said William in the place of the old barony of Delawarre, that mistake of theirs might have been rectified at any time; but it would not have followed, that therefore his lordship had no right to sit at all.

The king's grant of nobility by writ of summons was not governed by any of the rules by which his gift of lands was governed at the common law. The king's gift of lands was not good but by his letters patent, and by special words of grant. No inheritance passed from him without the word heirs; and if he was deceived in the motive which induced him to grant, his grant was void, and he might by his prerogative repeal it by *scire facias.* But if a commoner was once summoned to parliament, and sat, his blood was ennobled;

and his title and dignity descended to his heirs, though the king's motive to summon him were merely personal; viz. to have his advice and counsel; though there were no words in the writ of summons from which the king's intention could be collected, to give to the person summoned the state, title, and dignity of a baron, much less to expound it an estate of inheritance. When the person summoned sat, the writ of summons had its full effect, and could not afterwards be avoided, or made not to have been. His creation into the state and dignity of a baron was by operation of law, in consequence of his once sitting, and did not depend on the king's intention; which it would be of dangerous consequence to be guessing at, after such a length of time. The only point on which such a barony depended was, whether the person summoned sat; if he once sat in parliament the law ennobled his blood, and gave him a barony in fee.

The house of lords resolved, that the petitioner was entitled to the said barony of Strange, created by the said writ in 3 Charles I. Journ. v. xxv. 39.

§ 79. In the next year, Richard earl of Burlington claimed the dignity of baron Clifford, stating that Robert de Clifford was summoned to parliament in 28 Edward I. as a baron; and that the said barony came by mesne descents to Henry lord Clifford, who was created by king Henry VIII. earl of Cumberland, to him and the heirs male of his body. Barony of Clifford. 1737. Printed case. Journ. vol. xxv. 112.

That the said titles came by mesne descents to George earl of Cumberland, who died leaving only one daughter the lady Anne, by which the title and dignity of earl of Cumberland came to sir Francis Clifford, brother to the said George, as heir male of the body of the said Henry; but the said Francis never was seised of the title or dignity of a baron.

That the said barony of Clifford descended to the said lady Anne Clifford, from whom it descended to the daughters and coheirs of the then late earl of Thanet. Ante.

That Henry lord Clifford, the petitioner's ancestor, eldest son of the said Francis earl of Cumberland, was summoned to parliament in the lifetime of his father in 3 Charles I., without any letters patent, the writ being directed *Henrico*

Clifford, chevalier; and sat and voted in that and several succeeding parliaments.

That the said Henry lord Clifford left issue only one daughter, Elizabeth, who intermarried with William earl of Burlington, to which Elizabeth countess of Burlington the petitioner was great grandson and heir.

That therefore the title and dignity created by the said writ of summons, in virtue of which the said Henry Clifford sat and voted in parliament, was descended to the petitioner, who was sole heir to the said Henry lord Clifford.

Journ vol. xxv. 130. The house of lords resolved that the petitioner was entitled to the barony of Clifford created by the said writ.

§ 80. There can scarce be a doubt but that the crown, in the two preceding cases, issued writs of summons to the eldest sons of the earls of Derby and Cumberland, upon the idea that the old baronies of Strange and Clifford were then vested in their respective fathers. But this proving to have been a mistake, the house of lords conceived themselves obliged to admit that the writs operated as new creations of baronies, and resolved accordingly.

Is the same as that of the ancient Barony. § 81. It is observable that in the two preceding cases the claimants stated that the baronies, by the names of which their ancestors had been summoned, were not then vested in their fathers. From which it may be inferred that an opinion then prevailed that there was some difference between the operation of a writ of summons to the eldest son of a peer, by the name of a barony vested in his father, and that of a similar writ, by the name of a barony not then vested in his father.

§ 82. This idea was probably first suggested by the enquiry into the manner of creating peers; where speaking of the practice of calling up the eldest son of a peer to the house of lords, by the title of a barony then vested in his father, the author says, — " The writ of summons therefore seems not so much to be considered as the creation of a baron, but only as an instrument of conveyance, or method of transferring a barony or honor from one person to another; for if it is not so, what reason can be given why the eldest son of one earl,

Ante c. ii.

summoned by the title of his father's barony, shall have precedence according to the rank and antiquity of that barony; and that the eldest son of another earl, if he be by patent created to a title or barony foreign to his family, shall be considered as the younger baron: and have his place in the house of lords accordingly. I speak, and I think every man ought, with great submission on this subject; but if I mistake not, the law, even at this day, is that though the last of these persons takes a barony in fee, or otherwise according to the limitations of it, yet the first, upon whom the writ operates only by way of instrument of conveyance, has no other title in the barony, than his father had, from whom it was conveyed, and therefore if the father has only an estate tail in the barony, the state of the son, though summoned by writ, is not enlarged or made a fee, and descendible to heirs general.

§ 83. The doctrine here laid down has been adopted by the house of lords, and assented to by the crown, in the following case: —

Barony of Sydney. Printed case, 1782.

§ 84. King James I., by letters patent, created sir Robert Sydney lord Sydney of Penshurst, to him and the heirs male of his body; and afterwards created him viscount Lisle and earl of Leicester, with the same limitations. — These titles descended to his grandson Philip, whose eldest son Robert, by courtesy viscount Lisle, was in 1 William and Mary summoned to parliament by writ, and sat and voted under such writ by the title of lord Sydney of Penshurst in the lifetime of his father. These titles descended to John Sydney the son of Robert, who died without issue, leaving the two daughters of his next brother (Mary and Elizabeth Sydney) his heirs general, and Jocelyne his youngest brother his heir male, who became earl of Leicester, and afterwards died without issue, by which the dignities limited to the heirs male of sir Robert Sydney became extinct.

Upon the death of Mary Sydney without issue, Elizabeth her sister, who had married Mr. Perry, claimed the barony of Penshurst, as the sole heir of Robert Sydney, who was summoned to parliament by writ.

The attorney general (Mr. Wallace) stated in his report, that the petitioner claimed the barony of Sydney of Penshurst, as being the sole heir general of the body of Robert Sydney, who was called to parliament by writ in *vita patris*; upon a supposition that the effect and operation of the writ of summons to parliament without letters patent, and his having sat in parliament in pursuance thereof, vested a title in him to the barony, descendible to his lineal heirs. That a writ of summons to parliament, and a sitting in pursuance, did certainly in general cases ennoble the person and his descendants; but he conceived that the effect of a writ of summons to the eldest son of an earl or viscount, by the title of his father's barony, or to the eldest son of a baron who had two or more baronies, to one of his father's baronies, was to accelerate the succession of the son to the barony, which on his father's death would descend to him: and the extent of the inheritance depended upon the nature of his father's title to the barony, whether in fee or in tail male. That the usual manner of calling up the son of a peer *in vita patris*, was, by writ of summons to the barony of the father; and the persons thus called, had been constantly placed in the house of lords according to the antiquity of their fathers' barony. Although since the statute 31 Henry VIII., c. 10., for placing the lords, whereby the precedency of peers was fixed and established, the right to such precedency had at different times come under the consideration of the house; and although it did not appear that the house had determined the point, yet it was highly probable that the lords had satisfied themselves, that the eldest sons of peers, called up by writ into their fathers' baronies, were entitled to the same precedence and rights which they would have been entitled to, if they had succeeded to the same by descent; and that the calling them up by writ in their fathers' lifetime only accelerated the possession.

Lords Journ. vol. iv. 35., vol. xv. 523.

That he was of opinion, that the effect of the writ of summons to Robert Sydney to his father's barony, gave him the like inheritance his father had in the barony, which was restrained to heirs male; and that the petitioner was not, as

heir general, entitled to the barony. But as the case appeared anomalous, and never to have been precisely determined, he thought it advisable to refer it to the house of peers.

The case was accordingly referred to the house of peers, and on the part of the claimant it was insisted that a writ of summons to parliament, directed to any temporal person who sits in pursuance of it, although it contains no words of limitation, ennobles the person to whom it is directed, and his lineal descendants; or, as it has been sometimes expressed, gives a barony in fee. It was a general rule of law, so fully established, and was so little liable to be controverted, that it was presumed to be unnecessary to refer to the innumerable authorities contained in the books of law, and the resolutions of the house of peers in support of it.

The claim must therefore be admitted, unless it could be shown that the effect of a writ of summons, directed to the eldest son of an earl or viscount by the same title as that of his father's barony, or to the eldest son of a baron, who had two or more baronies, by a name the same as that of one of his father's baronies, was different from the effect of a writ of summons directed to other commoners. The attorney general had adopted a notion of this sort, and stated in his report, that the effect of a writ of summons in such cases was, to accelerate the succession of the son to the barony which on his father's death would descend to him; and that the extent of the inheritance depended on the nature of his father's title to the barony, whether in fee or in tail male. It was admitted by the attorney general, that a writ of summons so addressed, if its effect was such, formed an anomalous case, and a case which had never been precisely determined. It was contended further, that this doctrine of acceleration was perfectly novel, that it never occurred before to any of the great lawyers of this country, that a writ of summons in such cases had such an operation; and that there was nothing of authority to be found in any law book, or in the journals of parliament, to countenance the notion.

The practice of thus calling to parliament the sons of peers,

was stated by the report to have existed as far back as the reign of Edward IV.; and if the doctrine of the report could be maintained, it was extremely singular that every lawyer who, since the law of parliament upon this subject had been considered as settled, had treated upon the effect of a writ of summons to parliament, in which there were no words of limitation (with exception only of the author of a tract upon the origin and manner of creating peerages, whose reasoning the report seemed to abandon, though it adopted the result of it, and who contended against many of the most acknowledged principles of the law relating to peerages), should have stated in general terms, without reserve, qualification, or exception, that such a writ operated to ennoble the person to whom it was directed, if he sat in consequence of it, and his lineal descendants. By all writers of authority it had been observed, that letters patent in which there were no words of limitation, gave the grantee a dignity for life only; but it did not seem to have occurred to any such writer, that a writ of summons, where there were no such words, could enure to the person to whom it was addressed for his life only; or could enure, where there were not special words in the writ, so to direct the course of the inheritance, to him and his heirs male, or any other particular line of descendants. It might be safely assumed, that the doctrine was not to be found in any law book of authority; and was so extremely singular, that it might be very confidently asserted, that if the law acknowledged the doctrine, it could not have been unknown, or unnoticed, by the several great lawyers who had considered the nature and effect of these writs.

There were no principles of law to be found in the books which countenanced this doctrine. But on the other hand, it was apprehended to be a principle of law capable of being fully established, that the effect of a writ of summons where there were no special words to direct the course of the inheritance, was necessarily such as Mrs. Perry contended for; and that this prerogative act of making a peer, must be taken as intended to have its usual known and general effect, unless there were special words in the writ to denote that it was

intended to have a different, special, more limited, or more enlarged effect.

That the decisions and determinations of the house of lords, upon the effect of those writs, agreed with the doctrines in the books of law in which the subject had been considered; and the merits of claims of this nature had in fact been decided upon in several cases.

The cases of the barony of Clifford of Launsburg, the barony of Strange, and that of Clifford claimed by the earl of Burlington, are then mentioned; and it is observed, that as to the two last cases, it is said that the attorney general in his report stated it to have been insisted, that William earl of Derby and Francis earl of Cumberland were not seised of the baronies at the time their respective sons were summoned to parliament, and therefore that the writs of summons must have operated as new creations. — Whether they were or were not so seised, it was apprehended that the writs must have that operation. But the fact was, that the sons had precedence according to their fathers' supposed ancient baronies; and if the fathers were not seised, the crown certainly issued its writs under the idea that these two earls were seised of the said baronies; and the sons had the precedence in the house accordingly. And therefore the descendants of those peers owed their titles to their peerage to a mistake, in case the attorney general's state of the facts was correct. Ante.

These authorities would have great weight, as it was believed that no resolution of the house could be cited to warrant the doctrine stated in the attorney general's report; and which doctrine was most certainly no where asserted in terms in its proceedings.

If a writ directed to the son of a peer, calling him to parliament, by the same stile as that of his father's ancient barony, did not ennoble him and all his lineal descendants, it should seem to be its most natural effect to give dignity to the son only for life. But the authorities above stated proved that the dignity was descendible; and that the writ, without words of inheritance, created a fee even in this case. This the attorney general was obliged to admit, but he further

stated it was descendible only to the same line of heirs, as were in the succession to the father's ancient barony.

As the report contended against the general rules of the common law, and of the law of parliament, it was insisted on the part of Mrs. Perry, that it was incumbent upon those who maintained the doctrine stated in it, to prove clearly from the principles of the common law, and the law of parliament, that a dignity thus granted was not generally descendible, and that the grantee had only a qualified fee: until that was made out, she was entitled to the benefit of those general rules.

What the attorney general called an acceleration of the
Mr. West. son's succession to the father's barony, the writer, from whom the notion was borrowed, had termed a transfer or conveyance of the father's barony to the son in the father's lifetime. The report, though it adopted the notion in substance, had not expressed it by the said term; and to have insisted that the effect of the writ was to transfer or to convey the father's dignity, would certainly have been a proposition too manifestly repugnant to the known law of the land, and of parliament, to be stated in terms.

It was clear no dignity or honor could be transferred, aliened, granted, surrendered, or lost by non-claim, or the smallest interest therein parted with, but by attainder or act of parliament. It could not be merged in a higher dignity as a barony in an earldom, and much less could it be drowned in another barony or dignity of equal degree. This notion however of a transfer or conveyance of a peerage, was in fact included in the term, acceleration, used in the report. For it must be admitted, that as no two persons can at the same time enjoy the same honor, though two persons may at the same time have baronies of the same name, it was impossible that the son's succession to the father's honor could be accelerated, unless the father parted with the honor, or with some interest in it, which he could not do.

It was resolved and adjudged that the claimant had no right in consequence of her grandfather's summons and sitting.

Descent of dignities

§ 85. It has been stated in a former chapter, that where a dignity is created by letters patent, the state of inheritance

must be limited by apt and proper words, or else the grant is void. And where the mode of descent is marked out, the dignity will of course be transmissible to that class of heirs who are designated in the letters patent. by letters patent. Ch. iii. § 76.

§ 86. Thus under the common patents the dignity descends to the heirs male of the body of the person first ennobled, according to the right of primogeniture. But a person claiming a dignity of this kind must deduce his pedigree entirely through males; and a brother of the half blood may inherit; for lord Coke says, the issue in tail is ever of the whole blood of the donee. 1 Inst. 15. b.

§ 87. It has been stated, that king James I., by letters patent, dated in the first year of his reign, created sir Richard Fenys baron Say and Sele, to hold to him and the heirs of his body. But this was a restitution of an ancient barony created by writ, which was claimed by sir Richard Fenys. In this case, if there were a failure of issue male, and two or more daughters, I apprehend that the dignity would fall into abeyance among such females. Ch. iii. § 79.

§ 88. By letters patent in 16 Charles I., William Howard and Mary his wife, the only sister and heir of Henry baron Stafford, were created respectively baron and baroness of Stafford, to have and to hold respectively the same state, degree, dignity, stile, title, name, and honor of baron and baroness to the same William and Mary, and the heirs male of the bodies of the same William and Mary lawfully begotten, or to be begotten; and for default of such issue, then to the heirs of the bodies of the same William and Mary lawfully begotten, or to be begotten. Willing that the aforesaid W. Howard and Mary, so long as they or either of them shall live, and after their decease the aforesaid heirs male of their bodies; and for default of such issue the aforesaid heirs of their bodies respectively and successively, and every of them shall have and bear the name and state, degree, stile, title, and honor of baron and baroness Stafford.

§ 89. The most singular limitation of a dignity which I have met with is that of the barony of Lucas of Crudwell,

which was granted by letters patent 15 Charles II. to Mary countess of Kent, to hold to her and the heirs male of her body begotten by the earl of Kent, and for want of such issue, to the heirs of her body by the said earl, with a declaration "That if at any time or times after the death of the said Mary countess of Kent, and in default of issue male of her body by the said earl begotten, there shall be more persons than one who shall be coheirs of her body by the said earl, the said honor, title, and dignity shall go, and be held and enjoyed from time to time by such of the said coheirs as by course of descent of the common law should be inheritable to other entire and indivisible inheritances; as namely, an office of honor and public trust, or a castle for the necessary defence of the realm, or the like, in case any such inheritance was given or limited to the said Mary and the heirs of her body by the said earl begotten."

§ 90. The dukedom of Marlborough was limited by letters patent to John Churchill, and the heirs male of his body: and by the statute 5 Ann. c. iii. the dignity is limited, in default of issue male of the duke, to his eldest daughter, lady Harriet Godolphin, and the heirs male of her body; remainder to all his other daughters, severally and successively, according to their priority of birth, and to the heirs male of their respective bodies; remainder to the daughters of lady Harriet Godolphin, and to all the other daughters of the duke in the same manner; remainder to all and every other the issue male and female lineally descending from the duke, in such manner and for such estate as the same were before limited to the issue of the said duke. It being intended, and thereby enacted, that the said honors shall continue in all the issue of the said duke, so long as such issue male or female shall continue; and be held and enjoyed by them severally and successively in manner and form aforesaid; the elder and the descendants of every elder issue to be preferred before the younger of such issue.

Cases of claims to dignities of this kind.

§ 91. There are several cases where dignities have been claimed under letters patent, in which the principal diffi-

culty was to derive a pedigree from the original grantee of the dignity.

§ 92. Thus in 1707, William Ferdinand Carey petitioned the crown for the barony of Hunsdon, stating that sir Henry Carey was by letters patent, dated the 13th of January, 1 Elizabeth, created baron Hunsdon to him and the heirs male of his body. Barony of Hunsdon. Printed case. Journals, vol. xviii. 481.

That the said dignity descended to sir Robert Carey, who sat in several parliaments in the reign of king Charles II. and king James II., and from him to Robert Carey, who sat in parliament until 1703, when he died without issue.

That the said dignity then descended to the petitioner, who was born beyond seas, but naturalised by act of parliament, as lineal heir male of sir Henry Carey, first baron Hunsdon.

This petition having been referred to the house of lords, it was resolved, that the claimant had sufficiently made out and fully proved his pedigree and title to the said barony. Idem. 504.

A writ of summons was issued to him as baron Hunsdon, and he took his seat accordingly.

§ 93. Lawrence lord viscount Say and Sele petitioned the crown for a writ of summons in 1709, stating that his grandfather William, then baron Say and Sele, was by letters patent 22 James I. created viscount Say and Sele, to him and the heirs male of his body. Viscounty of Say and Sele. Journals, v. xix. 64.

That the said William viscount Say and Sele had four sons, viz. James, Nathaniel, John, and Richard.

That he was succeeded in that honor by his son James, who dying without issue male, was succeeded by William, then the only son of Nathaniel, the second son, who died in the lifetime of James.

That the said William died in 1698, and was succeeded by Nathaniel his only son, who died without issue; by which the honor was devolved upon the petitioner, as the only issue male of John, the third son of the first viscount.

This petition having been referred to the house of peers, it was there resolved that the petitioner had a right to a writ of summons to parliament. Idem 70.

Journ. vol. xix. 78.

A writ of summons was accordingly issued to him, and he took his seat as viscount Say and Sele.

Dukedom of Somerset. Collins's Peerage, vol. i. 200. Ante, c. iv. § 16.

§ 94. In 1750, sir Edward Seymour claimed the dukedom of Somerset under a limitation in remainder to his ancestor and the heirs male of his body, in letters patent of 1 Edward VI.

The case was referred to sir Dudley Ryder, then attorney general, who reported that the petitioner had sufficiently proved his right; and a writ of summons was issued to him, as duke of Somerset, under which he took his seat.

Barony of Chandos, 1790. Printed case.

§ 95. The reverend Mr. Edward Tymewell Bridges claimed the barony of Chandos, stating that her majesty queen Mary, by letters patent in the first year of her reign, granted to sir John Brydges, knight, the title and dignity of baron Chandos of Sudeley, to hold to him and the heirs male of his body for ever.

That the said John first lord Chandos had issue three sons; Edmund his eldest son, Charles his second son, and Anthony his third son, and likewise other younger sons.

That the title of baron Chandos descended to Edmund his eldest son, and continued in his issue male until the death of William seventh lord Chandos, without issue male, when the line of Edmund the eldest son of John first lord Chandos failed.

That the title then descended to sir James Brydges, baronet, eighth lord Chandos, who was the great-grandson and heir male of the body of Charles, the second son of the first lord Chandos; and continued in his issue male until the death of James duke of Chandos in 1789, without issue male; when there was a total failure of heirs male of the body of Charles, the second son of the first lord Chandos. And upon such failure, the claimant submitted that he was entitled to inherit the said honor and dignity as heir male of the body of Anthony, the third son of the first lord Chandos.

The attorney general reported, that he conceived the claimant had proved himself to be heir male of the body of John first lord Chandos; and as such entitled to the honor

and dignity of baron Chandos of Sudeley; by evidence which, although not without some difficulty, would be probably deemed sufficient to prove his title to any other species of inheritance, the foundation of which was laid so far back as the year 1554.

The petition and report having been referred to the house of peers, a majority of the committee not thinking the evidence sufficient, it was resolved that the petitioner had not made out his claim to the title and dignity of baron Chandos. 16 June, 1803.

§ 96. In 1796, George Powlett claimed the marquisate of Winchester, the earldom of Wiltshire, and the barony of St. John. Marquisate of Winchester.

The attorney general (sir John Scot) reported, that it appeared from the enrolment of letters patent in the rolls chapel, that in 30 Henry VIII. sir William Powlett was created baron St. John, to him and the heirs male of his body: and in 3 Edward VI. was created earl of Wiltshire, to him and the heirs male of his body; and in 5 Edward VI. was created marquis of Winchester, to him and the heirs male of his body.

That the original letters patent were all lost, but the enrolments were sufficient evidence to prove that such letters patent were really granted.

That the said George Powlett, the petitioner, was the heir male of the body of the said William, the first marquis of Winchester, earl of Wiltshire and baron St. John, and had sufficiently proved his right to the said titles under the patents above mentioned.

A writ of summons was issued to the petitioner as marquis of Winchester, under which he took his seat in the house of lords.

§ 97. William Fitzharding Berkeley claimed the earldom of Berkeley, stating that Frederick Augustus earl of Berkeley died in August 1810, leaving the claimant his eldest son and heir; he having been married to Mary the then dowager countess of Berkeley in 1785, and the claimant being the eldest son of that marriage, was heir male of the body of Earldom of Berkeley, 1811. Printed case.

George first earl of Berkeley, who was created earl of Berkeley, to him and the heirs male of his body by letters patent, in 31 Charles II.

This petition having been referred to the attorney general (sir V. Gibbs), he reported that it had been satisfactorily proved before him that the earldom of Berkeley was granted by letters patent to George lord Berkeley and the heirs male of his body; and that the said dignity descended to the said Frederick Augustus earl of Berkeley, the father of the petitioner; and had now descended to the petitioner, if he was the lawful eldest son of the said late earl.

That the dowager countess of Berkeley had stated to him that she was married to the late earl on the 30th March, 1785, and that the petitioner was the eldest son of the said late earl and herself, born 26th December, 1786.

That a copy of the register of the said marriage extracted from the register book of the parish of Berkeley, in the county of Gloucester, was produced to him.

That in consequence of some enquiries which this information led him to make, he found that a second marriage had been solemnized between the said late earl and the then dowager countess of Berkeley on the 16th May, 1796, which was long after the birth of the petitioner.

That a copy of the register of the second marriage, taken from the register book of the parish of Lambeth in the county of Surry, was produced to him, and that he was informed that the petitioner had much parol evidence to bring forward, for the purpose of explaining the fact of the second marriage, and of establishing the validity of the first.

That under these circumstances, having no power to examine the witnesses who might be called before him, upon both, and seeing that without such an examination, the validity of the first marriage, upon which the claim of the petitioner altogether depended, could not be brought to a satisfactory decision, he had followed the usual practice of his predecessors in office, where the case before them had

been attended with doubt or difficulty; and advised his majesty to refer the petition to the house of lords.

The petition was accordingly referred to the house of lords. The claim was heard before the committee of privileges, where a great number of witnesses were examined, and the committee not being satisfied with the proofs of the first marriage, resolved that the claimant had not made out his claim to the titles, dignities, and honors of earl Berkeley, &c. which was confirmed by the house. 2 July, 1811.

§ 98. Hans Francis Hastings, esq. petitioned His Royal Highness the Prince Regent for the earldom of Huntingdon. Upon a reference to the attorney general (sir Samuel Shepherd), he on the 29th October 1818, reported that the said earldom was created by letters patent, under the great seal, dated 8th December, 21 Henry VIII., advancing George lord Hastings to the dignity of earl of Huntingdon, with limitation to the heirs male of his body, and that the petitioner stated that under such letters patent he was entitled to the said earldom, as the surviving heir male of the body of the said George first earl of Huntingdon. Earldom of Huntingdon.

That the said George first earl of Huntingdon left issue five sons, of whom sir Francis the eldest succeeded to the earldom, and died leaving six sons, Henry, George, William, who died without issue, sir Edward, fourth son, from whom the petitioner was descended, and was heir male of his body, and two other sons. That all the male descendants of Henry and George, the two elder sons of sir Francis, the second earl of Huntingdon, were extinct, by which the said Hans Francis Hastings was become heir male of the body of the first earl of Huntingdon.

The report concludes in these words. "Upon the whole of this case I am humbly of opinion that the petitioner, Hans Francis Hastings, has sufficiently proved his right to the title of earl of Huntingdon. And that it may be advisable, if your Royal Highness shall be graciously pleased so to do, to order a writ of summons to pass the great seal, to summon the petitioner to sit in parliament, and there to enjoy the rank and privileges to the said title belonging."

A writ of summons was issued accordingly, and Mr. Hastings took his seat in the house of peers, as earl of Huntingdon.*

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* The case of Willoughby of Parham has been already stated, and the cases of the earldoms of Anglesey and Banbury will be found in the next chapter.

CHAPTER VI.

JURISDICTION AND MODE OF PROCEEDING IN CLAIMS TO DIGNITIES.

§ 1. *Jurisdiction of the Crown.*
17. *Mode of Proceeding.*
18. *Petition to the King.*
20. *Reference to the Attorney General.*
24. *Reference to the House of Peers.*
28. *Proceedings there.*
32. *What Proofs necessary.*
35. *Proofs of a Barony by Writ.*
38. *Proofs of a Writ of Summons.*
43. *Proofs of a Sitting.*
48. *Proofs of a Dignity by Letters Patent.*
51. *Proofs of Pedigree.*
§ 57. *Inquisitions post mortem.*
60. *Parish Registers.*
63. *Books of the Herald's Office.*
65. *Judicial Proceedings.*
67. *Deeds.*
68. *Wills and Administrations.*
69. *Inscriptions on Tombs, &c.*
71. *Hearsay Declarations.*
74. *Proofs of Marriage.*
88. *Proofs of Legitimacy.*
90. *Resolutions of the House of Peers.*
95. *Effect of such Resolutions.*
100. *Not generally conclusive in any Case.*

SECTION I.

THE crown appears to have exercised from the earliest times the supreme jurisdiction in all cases respecting the right to those dignities which were not annexed to the possession of particular castles, honors, lordships, or manors. For the mode of proceeding seems always to have been by petition to the king; and the court to which the crown usually referred such claims was that of the high constable and earl marshal, where cases were determined by the rules and customs of chivalry. Jurisdiction of the crown.

§ 2. Thus in the claim of Mr. Wymbish to the name and title of lord Taylboys, when king Henry VIII. consulted the two chief justices, they answered, "That the common law dealeth little with titles and customs of chivalry, but such questions had always been decided before the constables and marshals of England." Collins, 11.

Collins, 5-39. § 3. In the case of Mr. Berty, in queen Elizabeth's time, claiming the barony of Willoughby by the curtesy of England, it is said, "Albeit for the most part the manner of trials in questions of nobility and chivalry, have not been by jury, after the course of the common law, but by depositions and proofs, after the manner of the civil law*; and therefore the constable and marshal of England have used to call divers doctors to assist them; yet always the issues ought to rely on the customs of chivalry used within this realm."

1 Inst. 391. b. 4-125. § 4. It is said by lord Coke, that the court of the constable and marshal proceeds according to the customs and usages of chivalry; and in cases omitted, according to the civil law, *secundum legem armorum.* It should, however, be observed, that questions of this nature were never determined according to the Roman law, but by the common law of England. For

Collins, 63. even the doctors of civil law held that titles and matters of honor and dignity were to be ordered and ruled according to the custom of every particular country. It being a maxim of theirs, that *consuetudo in unaquaque regione est omnium dignitatum.*

Collins, 64. § 5. In the case of the barony of Abergavenny, 2 James I., it was contended on behalf of sir Thomas Fane, that the question ought to be decided according to the customs of

Id. 104. chivalry, and not by the common law. On the other side serjeant Doddridge said, the court of the earl marshal had particular jurisdiction, originally and primarily, to determine all matters concerning chivalry, dignity, honor, and arms. But as other courts might also, indirectly, though not originally, determine such questions, if the court of the earl marshal should adjudge one way, by any foreign laws, and the court of king's bench adjudge another way, by the common law, great confusion and inconvenience would ensue; therefore the common law ought to decide the controversy.

§ 6. The mode of proceeding in this court is so fully de-

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* Even in an action at law, if issue be joined whether a person be a baron or not, it shall not be tried by a jury, but by the record of parliament, 1 Inst. 16. b.

scribed by Milles in his Political Nobility (a book which was published in the beginning of the reign of king James I.), that I shall transcribe the passage:—

" For the disciding of sutes concerning honours, and for the preservation unto every man the right of his fame or dignity, the natural tribunal, seat or court for the nobility is every where called by this name, *Militaris;* that is to say, the marshall or military court, and commonly the court of chivalry: the form whereof with us is this—the appointed place for the holding thereof is the king's hall, wherein the constable of the kingdome, and the marshall of England, sit as judges; where any plaintiffe, either in cases of dignities or armes, or of any other sute or controversie concerning nobility, may sue the defendant. Milles, Cat. 82.

" The forme of prosecuting the action is on both sides tryed by the looking into of letters patent, ancient charters, and of evidences, (as they terme them) and by witnesses. All things are for the most part acted by their advocates in writings in latine or in french. At length the definitive sentence, according unto equity and right, and our own heroical custome, and not after any strange manner, sealed with the publicke seal of the office, is openly read, and afterwards is delivered to the earle marshall to be put into execution.

" If any thing chance to be unprovidently done, or unadvisedly in the sute overslipped, on either part, it is lawful for them to appeal unto the king, who is wont to refer the whole matter unto the byshops and other ecclesiastical persons, unto the learned lawyers, and others of most upright life, to be diligently again examined and expounded."

§ 7. The court of the high constable and earl marshal lost a considerable portion of its lustre and consequence by the abolition of the office of high constable, in the reign of king Henry VIII. But still retained its jurisdiction in cases of arms and honor. 1 Inst. 74. b. Note 1. 4 Inst. 125.

§ 8. Thus in 10 Elizabeth a claim to the title, honor, and barony of Dacre of Gillesland was brought before the duke of Norfolk, as earl marshal; but because the duke was both father- Herald's Coll. Book, W. G. 200.

in-law and guardian to some of the parties; his grace became suitor to her majesty, that though the trial thereof did of right belong to himself, by reason of his office of earl marshal of England, as a matter incident to be tried, decided and judged before him, in respect of his said office, of long time used and accustomed; that some of her highness's counsel might be appointed to hear the same. Whereupon the queen directed a commission to the marquis of Northampton, the earl of Pembroke, the earl of Arundel, and the earl of Leicester, giving them authority to hear and determine the controversy aforesaid, according to equity and right; with a special saving of the right of the earl marshal.

1 Inst. 74. b. n. 1.

§ 9. In 20 James I., the lord keeper, the master of the rolls, and a great number of the privy council, after a solemn hearing, declared that the earl marshal had all the powers of judicature, without the high constable, during the vacancy of that office; and upon report of this to the king, he issued his commission under the great seal to the then earl marshal, commanding him to proceed in all causes whatsoever, whereof the court of constable ought properly to take cognizance, as judicially and definitively as any constable or marshal, either jointly or separately, theretofore had done.

§ 10. When the office of earl marshal was in commission, claims to dignities were usually referred to the commissioners. Though in the following instance a claim of this nature, but which was in fact only a case of precedence, was referred to the house of lords:—

11 Rep. 1. Ante, c. iv.

§ 11. Lord La Warre petitioned queen Elizabeth for the ancient barony of Delawarre. The petition was referred to the house of peers, and indorsed in these words: "Her majesty hath commanded me to signify to your lordships, that upon the humble suit of the lord La Warre, she is pleased that the matter shall be considered and determined in the house."

The consideration of the petition was committed by the house to lord Burghley, lord treasurer, and divers other committees, who, at his chamber in Whitehall, heard the counsel learned of both parties, in the presence of the two chief jus-

tices, and divers other justices, and made a report of their resolution to the house, who allowed it. Whereupon it was ordered by the lords that the queen should be acquainted with it by the lord keeper of the great seal; which was done accordingly, and the queen likewise confirmed it.

§ 12. In the reign of king James I. the claim of Edward Neville to the earldom of Westmoreland was, "by command of the king propounded to all the judges." The claim of Sampson Lennard to the barony of Dacre was referred by that prince to the lords in commission for martial causes. As also the claim of the earl of Rutland to the barony of Roos. But the claims of sir Thomas Fane and Mr. Neville to the barony of Abergavenny, in the same reign, were referred to the house of peers.* 7 Rep. 33. Collins, 24-162.

§ 13. In the reign of king Charles I. the claims of Robert de Vere and lord Willoughby de Eresby to the earldom of Oxford, and office of great chamberlain, was referred to the house of peers, but the words of the reference show that it was not a matter of course:—

"Since these petitions concern so great an honor and office of inheritance, and that it falls out so opportunely during the sitting of our high court of parliament, we think it fit to take the advice of our lords and peers of our higher house of parliament, who have the judges with them, for their assistance, in any point of law which may arise. Therefore our pleasure is, that their lordships call the competitors before them, and examine their titles, and certify us what they find, and their opinions thereof, whereupon we shall do that to either party which shall be just." Journ. vol. iii. 510.

§ 14. King Charles I. by letters patent, dated in the 13th year of his reign, issued a commission of enquiry, directed to the earl of Manchester, lord keeper of the privy seal, the

* The first case in which a claim to a dignity appears to have been discussed by the house of lords, is that of the earldom of Arundel, 11 Henry VI., of which an account has been given in ch. ii., where the king decided the controversy by an act made with the advice and assent of the peers in parliament. Lord Hale's Jur. of the Lords, c. 17.

earl of Dorset, the queen's chamberlain, and sir Francis Windebank, one of the secretaries of state, by which, after reciting that he had lately required them to call before them one who called himself by the name of Roger Stafford, and as the said king was informed, did pretend a right and title to the honor and dignity of lord Stafford, and to examine as well his descent, and what other reasons or grounds of pretence he had to that title, as also what could be produced to the contrary; then to the end that the truth might appear, and forasmuch as the said king understood that the said party was of a very mean and obscure condition, and it concerned the king, as being the fountain and protector of true honor within his dominions, to be careful that a person of so mean a quality should not be suffered to take upon him the name and pretended right to be of so noble and ancient a family, but upon good and apparent grounds; the king thereby required and authorised the said three commissioners, or any two of them, to examine upon oath all such persons as should be produced on either side, or whom they should think fit to receive information by, for the better clearing of the aforesaid matters in question. And for the said king's satisfaction, in a business of such importance, two years after this Roger Stafford levied a fine of the barony of Stafford to the king.

Ante, ch. iv. § 48.

Collins, 286.

§ 15. In the reign of king Charles II., the claim of Mr. Mildmay to the barony of Fitzwalter was referred by that prince to the house of lords, and there agreed; but no resolution come to, on account of a prorogation of parliament. His majesty therefore directed that the claim should be heard at the council board; where it was argued by counsel on behalf of Mr. Mildmay, and of Mr. Cheeke who opposed the claim, in the presence of the king, the two chief justices, the chief baron, the king's chief serjeant at law, and the attorney and solicitor general; when, after consulting the judges upon two very important points of law, with whose opinions and resolutions his majesty being fully satisfied, "It was ordered by his majesty, that the petitioner was admitted

humbly to address himself to his majesty for his writ to sit in the house of peers as baron Fitzwalter."

A writ was issued accordingly, and Mr. Mildmay was seated in the house of peers as baron Fitzwalter. Journ. vol. xii. 288.

§ 16. Since that period, whenever the attorney general has recommended a further examination of a claim to a dignity, it has been uniformly referred by the crown to the house of peers. That house has however no right to interfere in cases of claims to dignities, but by reference from the crown. Thus lord Hale in his treatise on the jurisdiction of the lords, says, "And hitherto may be referred the cases of titles of honour and precedence, between the nobility. Though regularly such cases come first to the king, and by reference from him to the lords."*

§ 17. Where a dignity or title of honor has been dormant for a considerable time, either from the negligence of those who were entitled to it, or from the difficulty of ascertaining to whom it belonged; or from its having fallen into abeyance among coheirs, or any other cause, the lord chancellor will not issue a writ of summons to the person claiming it, without a previous examination of his right. Mode of proceeding.

§ 18. The first step then in all cases of this kind is, for the claimant to present a petition to the king, through the medium of the secretary of state for the home department, which is in the nature of a petition of right; stating the original creation of the dignity, and the exercise of it, with a short account of the claimant's title and pedigree; and praying that it may be adjudged and declared to belong to him, or praying a writ of summons to parliament by the stile and title of the dignity so claimed. Petition to the King.

§ 19. Besides claims to dignities, there are several instances, in modern times, of claims made to coheirships in those antient baronies that are descendible to female heirs; and which are therefore subject to fall into abeyance. Be-

* It is said by lord Coke, that the house of peers has a jurisdiction in all matters of precedence of peers. 4 Inst. 363. 13 Coke's Rep. 63. Barony of Strange, ante, c. v.

cause where a person has fully established that a barony is descendible to female heirs, and is actually in abeyance; and that he is one of the coheirs to such barony; the crown may, and frequently has, terminated the abeyance by confirming it to such coheir, as in the cases of Botetourt and Roos. And in such cases the prayer of the petition is, that the barony may be declared in abeyance, and that the petitioner is one of the coheirs to such barony.

Ante.

Reference to the Attorney General.

§ 20. In modern times it has been the usual practice to refer all petitions presented to the crown, respecting claims to peerages, in the first instance, to the attorney general: requiring him to examine them, and to make his report thereon.

§ 21. After such reference is made, the claimant, by his agent or solicitor, lays before the attorney general a statement of his case, produces his evidence, and in many cases is heard by his counsel.

§ 22. Where any person opposes a claim to a dignity, he may enter a *caveat* in the attorney general's office; in consequence of which he will be allowed to attend by his agent or solicitor, and be heard by his counsel. And where it appears to the attorney general that any other person is interested in the claim, he directs notice to be given to such person.

§ 23. If the case appears to be a clear one, and the claimant produces satisfactory evidence of the facts, the attorney general reports that he is entitled to the dignity; and that his majesty, if he shall so please, may direct a writ of summons to be issued to him. And if the lord chancellor concurs in that opinion, a writ is issued accordingly, and the claimant takes his seat in the house of peers. As in the cases of the dukedom of Somerset, the barony of Hastings, the marquisate of Winchester, and the earldom of Huntingdon. But where the dignity has been long unclaimed, or in abeyance, or where the attorney general has any doubts upon the case, he recommends that the claim be referred by his majesty to the house of peers.

Reference to the

§ 24. Where the attorney general recommends a claim of

this kind to be referred to the house of peers, an order of reference is made by his majesty accordingly, which is usually in these words. House of Peers.

" His majesty being moved upon this petition, is graciously pleased to refer the same, together with the report of the attorney general, hereunto annexed, to the right honorable the house of peers, to examine the allegations thereof, as to what relates to the petitioner's title therein mentioned, and to inform his majesty how the same shall appear to their lordships."

§ 25. This reference to the house of peers is discretionary in the crown, for it might resume the former practice of referring claims of peerage to the court of the earl marshal, or may act on the report of the attorney general, and grant the claimant a writ of summons, without any reference; or refuse to make any reference, as was done in the case of the earldom of Banbury in 1727, by the advice of sir Philip Yorke, afterwards lord Hardwicke. Ante. Ante.

§ 26. It has been already stated that without a reference by the crown, the house of lords has no right to entertain a claim to a dignity; though there is one case in which the house did take cognizance of a claim to a dignity, without any reference from the crown; but afterwards the house applied to the king for permission to proceed in the claim, which was granted. Rex v. Earl of Banbury, infra.

§ 27. In 1672, the countess dowager of Northumberland presented a petition to the house of lords, complaining that a person calling himself James Percy assumed the title of earl of Northumberland and lord Percy, to the dishonor of that family. Earldom of Northumberland. Journ. vol. xii. 553.

The house referred the matter to the committee of privileges.

Some time after, the earl of Carlisle acquainted the house, that the earl of Suffolk and himself had moved his majesty for to give the house leave to hear James Percy, concerning his claim to the earldom of Northumberland; and his majesty had given leave to the house to hear and determine the same accordingly. Id. 578.

The case was heard on behalf of the countess of Northumberland, but Percy refused by his counsel to proceed to make out his claim, but prayed longer time for that purpose; upon which their lordships offering, that if the said James Percy, by his counsel, would make appear any probability towards his said claim, he should have further time allowed him; which he refused to do. It was resolved that his petition should be dismissed.

Journ. vol. xiv. 24. In the year 1685, the duke and duchess of Somerset presented a petition of the same kind against the said James Percy, which was referred to the committee of privileges.

Id. 38. Soon after a packet of papers was found on the table of the house, subscribed *Percies'* petition of complaint, which was referred to the committee of privileges to open the same.

Id. 224 The committee of privileges reported, that as the former petition was dismissed, there should be no countenance given to the petition; and that the petitioner's calling himself right and lawful earl of Northumberland, after the house had dismissed his former petition, was insolent and injurious to the house.

Id. 240. Some time after, the house heard counsel on behalf of James Percy; and the lords judging that his pretensions were groundless, false, and scandalous, ordered that the said James Percy should be brought before the four courts in Westminster Hall, wearing a paper upon his breast, in which should be written — The false and impudent pretender to the earldom of Northumberland!

Proceedings there. § 28. When the king's reference is presented to the house of peers, an order is made, referring the petition and the report of the attorney general, together with all other papers relating to the claim, to the committee of privileges; before whom the petitioner must proceed.

24 March, 1767. And by a standing order of the house of peers, that committee is directed not to proceed to the hearing of any claim to a title of honor until fourteen days after printed cases shall have been delivered, which shall contain an abstract of the proofs and authorities upon which such claim may be founded, with the dates thereof, and references where the

same may be found. And where any unforeseen objections are made to the claim, or any new matter is discovered by the claimant, he may petition the house for leave to present an additional case, which is usually granted.

§ 29. When the committee of privileges sits, the claimant appears by his agent and counsel, who state his case; and the attorney general always attends, on behalf of the crown, to inspect the evidence produced by the claimant, and to make such objections to the case and pedigree as may occur to him. It being the duty of that officer to guard the rights of the crown, and those of the peerage, and not to suffer any person to be admitted into that body, who does not prove a clear and indisputable title to a dignity.

§ 30. While the claim is pending, any person may, by petition to the house, oppose it, and make a claim; and will be allowed to present a printed case, and be heard thereon by his counsel, before the committee of privileges; and where that committee apprehends that any other person may have a right to the dignity claimed, they will direct the claimant to give notice to such person. Barony of Powis, c. v.

§ 31. Where any difficulty arises in matters of law, the house of peers usually summons the judges to their assistance, and requires their opinion upon abstract cases which they put to them. And in some cases the committee of privileges make a special report to the house; and require instructions how to proceed, as in the late case of the barony of Borthwick. Infra.

§ 32. In all cases of claims to dignities there must be full and sufficient proofs as to two points. First, of the creation of the dignity, and of its existence at the time it is claimed; and secondly, of the pedigree of the claimant. What proofs necessary.

§ 33. The creation of a dignity must be proved by matter of record; except in the case of a woman claiming a dignity by marriage. Thus in the countess of Rutland's case, it was resolved, "that duke or not duke, earl or not earl, baron or no baron, shall not be tried by the country, but by record; for if they be lords of parliament, it appears by record; and therefore by record, *viz.* by the king's writ, it ought to be cer- 3 Ja. I. 6. Coke's Rep. 52.

tified. But a woman, who is a duchess, countess, or baroness by marriage, which is a matter of fact, in such case not duchess, &c. shall be tried by the country; for their dignity accrued to them by matter in fact."

Skinner's Rep. Rex v. Banbury.

§ 34. "No man," says lord Holt, "can be a peer without matter of record; for it ought to be either by letters patent under the great seal, which is the most common way at this day, and by which the patentee is ennobled immediately, though he had never sat in parliament. Or by writ, by which the party is not ennobled until he sit in parliament; and the which is countermandable by death; or by the king, by a *supersedeas*, before the sitting in parliament. But in both cases his nobility commences by matter of record, and is matter of record. And when a man pleads any such matter, he ought to shew a record of it, that is, shew the letters patent of his creation, or otherwise shew some writ on record, by which he or his ancestors, under whom he claims, have been created peers, or summoned, or sat in parliament. For peerage is not a matter in *pais*, to be gained by prescription, no more than felons' goods, deodands, &c. But there ought to be some matter of record of it; in the same manner as there ought to be some allowance in eyre, &c. of the others. And in this case, earl or not earl shall be tried by record; *scilicet*, he ought to shew some record by which he or his ancestors have been ennobled; nobility not being a matter which may be gained by usage in *pais*. But if he begins and shews his title by record, and then makes a descent, in such case the descent was never tried by record."

Proofs of a barony by writ.

§ 35. It has been stated that where several writs of summons to parliament appear to have issued to a person prior to the eleventh of king Richard II. a barony by writ will be held to have been thereby created in such person. Because the first creation of a barony by letters patent was in that year.

Barony of Zouch, ch. v.

Ch. v.

§ 36. In the case of the barony of Clinton, in 1794, the original creation of the barony was not shown. But it appearing from the journals, that in consequence of a question which arose in 4 & 5 Philip and Mary between the lord Clinton and the lord Stafford, concerning their precedence, the house had

adjudged, that the lord Clinton had always place next above the lords Audeley. This was held sufficient proof that the barony of Clinton was originally created by writ; because this precedence was far above that of any barony by patent.

§ 37. In the case of the barony of Conyers, the first person who appeared to have been summoned by writ by that title, was William Conyers in 1 Henry VIII.; and the patent and close rolls having been searched from the beginning of the reign of king Richard II. to the 1 Henry VIII. inclusive, and no patent of creation to any of the family appearing, nor any prior writ of summons, the house of peers held the barony to be by writ. Ch. v. § 68.

§ 38. With respect to the proofs of a writ of summons, the original writ itself should be produced, or else sufficient evidence given that such a writ was issued. Proofs of a writ of summons.

Lord Hale says, "there are several kinds of records of things done in parliament, first, the summons to parliament, and that these are not all entered of record in the times of Henry III. and Edward I. none being extant of record in the time of Henry III. but that of 49 Henry III. and none in the time of Edward I. till the twenty-third of that prince. But after that year they are for the most part extant of record, *viz.* In *Dorso Claus' Rotulorum*, on the back of the close rolls." Hist. v. i. 15. 8vo.

§ 39. Many of these records, from 49 Henry III. to the year 1685, have been published by sir William Dugdale in a work entitled, *Summons to Parliament.* The writ of summons, addressed to one of the principal persons summoned, is transcribed on the back of the close roll, after which come these words: *Eodem modo mandatum est;* or, *Consimilia brevia diriguntur infrascriptis.* And then follows a list of all the other persons summoned.*

§ 40. It became a practice about the time of king Henry VIII. when a parliament was to be called, for the clerks of the petty bag office in chancery, in pursuance of a warrant Pettus on Parliaments, ch. 2.

* A much more complete collection of the lists of writs of summons to parliament will soon be published under the direction of the house of lords.

from the lord chancellor, to prepare a schedule, in which were set down the forms of the writs to be issued to the peers, and the names, stile, and title of the persons to whom such writs were to be sent, which are called parliamentary pawns.

Idem.

§ 41. These pawns were formerly made out with the help of the masters in chancery, and the heralds; and being fairly engrossed on parchment, are preserved in the petty bag office. For in the late report on the public records, D. p. 100. the clerks of the petty bag office make the following return, No. 11. "Parliament pawns from 21 Henry VIII. to the present time." They have always been deemed sufficient evidence of writs of summons having been issued; as appears from the following case.

§ 42. In 1660, the earl of Dorset reported from the committee of privileges the case of lord Sandys, touching his claim to sit in the house as a peer. That upon search made in the office of the petty bag, in the pawns there of record, several writs of summons appeared to have been directed to his ancestors. Upon which the house was satisfied of his lordship's title to the honor; and the next day he took his seat.*

Proofs of a sitting.

§ 43. The proofs of a sitting in parliament by virtue of a writ of summons must be by the records of parliament. For

1 Inst. 16. b. 12 Rep. 70—96.

lord Coke says, "if issue be joined in any action, whether a person be a baron or not, it shall not be tried by a jury, but by the records of parliament."

Skinner's Rep. 520.

§ 44. The ancient form of claiming to be a baron by descent was thus: "Forasmuch as his ancestors had been barons, and lords of parliament, and that they have had their place in the same house of parliament." And whether they were lords of parliament or not, must appear and be proved by the records of parliament.

§ 45. It is said that the most ancient proof of a sitting in parliament extant is the letter written by the nobles in parlia-

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* In modern times the parliamentary pawns have always been admitted as evidence of writs of summons. Barony of Howard of Walden, ante, ch. v., and Minutes of the Comm. of Priv., Barony of Roos, No. 140.

ment in 29 Edward I. to the pope, respecting the sovereignty he claimed in Scotland; which may be seen in *Rymer's Fœdera*, under that year; and also in Dugdale's Summons to Parliament. But this is a mistake; for there are two records, of a prior date to that letter, published in the Rolls of Parliament, vol. i. p. 25. No. 15. and p. 224. No. 2., in which the names of several persons, who then sat in parliament, are mentioned; and the letter to the pope is not now held to be authentic.

§ 46. The ancient records, or rolls of parliament, which are now printed, are so imperfect that it is very seldom they contain proof of the sitting in parliament of any of the peers who were summoned. No lists of the persons who attended parliament are to be found in them, nor are the names of any of the peers who were present mentioned, except where they happen to be appointed triers of petitions, or have acted in some particular situation. There are, however, some cases in which a sitting has been proved from the ancient rolls of parliament.

§ 47. Thus in the case of the barony of Botetourt, the following records were produced, to show that John de Botetourt, the grandfather, and John de Botetourt, the grandson, were present and sat in the parliaments to which they were summoned. Printed case.

To prove that John de Botetourt, the grandfather, was present, and sat in the parliament of 33 Edward I., there was a record on the clause roll 33 Edward I., intituled, *Ordinatio facta per dominum regem super stabilitate terræ Scotiæ.* The effect of this record was, that the king in parliament, holden at Westminster in lent, in the thirty-third year of his reign, had made known by the bishop of Glagu, the earl of Carrick, and certain other persons, that the good people of Scotland should cause to assemble the commons of the land, and that from amongst them all they should elect a certain number of gentlemen, to come on behalf of the commons to the parliament which the king had ordered to be held, and which was by several prorogations held on the feast of the nativity of our Lady; at which place and time, the persons elected and named

in the record came to treat of the business and settlement of Scotland. And there were also assigned sundry bishops, abbots, earls, lords, and gentlemen on the part of England; and John lord Botetourt was one of the persons so assigned; and appeared therefore by that record to be then sitting in the said parliament, to which he was summoned by a special writ as one of the barons.

That record was supported by another of the same year, extant among the *placita parliamentaria*, intituled, *processus tangens episcopum Bibliensem.* It recites a petition by Hugh, bishop of Biblos, in Palestine, to be advanced to the priory of Coddingham in Scotland, pursuant to letters of provision thereof by the pope.

The answer to this requisition is, that allowing it, would be prejudicial to the king and his royal crown. The names of the lords, who were present on this occasion, were particularly mentioned in the record, and John de Botetourt was one of them.

There was also evidence, that John de Botetourt was present in the parliament in the third year of Edward II., to which he was summoned. The king agreed in that parliament that certain of the prelates, earls and barons, who should be chosen for that purpose by the lords in parliament, should have power to make ordinances for the better regulation of his household, and of the kingdom. — The king's assent was extant on the patent roll of that year. The ordinances so made were also extant on the close roll, and the names of the persons elected appeared by an instrument signed by them, reciting the proceeding, which was also entered upon the close roll. John de Botetourt was one of them.

To prove that John the second lord de Botetourt was present, and sat in the parliament in the fiftieth year of Edward III., to which he was summoned, the roll of parliament in that year set forth a proceeding in the parliament, then holden at Westminster, against William lord Latymer, impeached and accused by the commons for divers deceits, extortions, grievances and other crimes, enumerated in the said record, &c. Whereupon the said lord Latymer found in parliament

certain prelates, lords and others to be his mainpernors for his appearance to answer the aforesaid articles, amongst whom was the lord Botetourt; who had been regularly summoned as a baron, previous to the sitting of the said parliament, in the fiftieth year of Edward III.

It is said in the printed case, that if any objection could be framed to these records as evidence of a sitting in parliament, such objection must be taken either to the competency, or to the effect of the evidence.

An objection to the competency of this evidence, could only take its rise from its being usual, in claims of this nature, to prove the sitting by the journals of the house of lords; from whence it might possibly be inferred, that no other evidence was admissible to prove a sitting in parliament.

To which it was answered: first, that it had never been laid down, that the sitting in parliament must be proved by the journals of the house of lords; but all the authorities agreed in establishing this rule — that the sitting must be proved by the records of parliament. The house of lords had, in questions of this nature, given credit to their journals, where a sitting could be proved by them; but the practice, which seemed rather an indulgence to the claimant, could never be construed to establish the authority of the journals above that of the records: for, in strictness, journals are no records, but remembrances for form of proceeding to the record. They were not of necessity, neither had they always been. They were not any record, but notes and memorials for the clerks to perfect and enter the records. But the evidence above stated was that of the records of parliament; the first record being strictly an act of parliament, and the others full and complete records of transactions in parliament, all entered upon the proper rolls, and produced from the public archives. It was therefore evidence not only of an equal, but in most questions of a superior authority to the journals; and in this question, it was strictly and properly that very evidence which the law required to support the inheritance of a peerage: secondly, the state of the journals was such, that

Hob. 110.

Skinner, 527.

this objection could not be allowed without great danger to all ancient baronies.

There were no journals before the reign of Henry VIII., nor were they regularly preserved during that reign. An ancient original letter, prefixed to the journal book of Henry VIII., intimates that several journals were taken away and suppressed by cardinal Wolsey. It did not seem reasonable that either this accident, or the neglect of a clerk to the journals, should be of any prejudice to the nobility in the inheritance of their honors; and yet if no barony could be claimed without proof of a sitting by the journals, all those ancient baronies which have been united with higher honors before the reign of Henry VIII., or during those years of which the journals have been suppressed, must be lost.

Thirdly, baronies had in fact been allowed, though no sitting could have been proved by the journals. In the case of the barony of Grey of Ruthyn, in 1640, the claim to that barony was allowed, upon great deliberation and very accurate enquiry, though it was evident no sitting could have been proved by the journals, because there was no person summoned under that title from the second year of Edward IV., the lord Grey of Ruthyn being soon afterwards created earl of Kent. The barony of Mowbray was revived without objection in favor of Henry, eldest son of the earl of Arundel, though no person had been summoned under that title from the thirty-ninth of Edward III. Algernon, duke of Somerset, took his seat in the house of peers as baron Percy, upon the death of his mother, in 1722, without objection; though no sitting could have been shown from the journals, no person having sat in right of the old barony of Percy from the fiftieth year of Edward III. And lastly, no sitting could be proved by the journals in the case of the barony of le Despencer.

Collins, 195.

The objection to the effect of the records could only be, that they did not amount to a direct proof that John de Botetourt was present and sat in parliament as a baron.

To this it was answered, that John de Botetourt was summoned to the parliament in the thirty-third year of Edward I.;

and was not only mentioned as one of those commissioned to treat of the affairs of Scotland with the deputies sent from thence, but as one who actually did in parliament treat with them, and agreed upon the ordinances recited in the record. If it were possible to suppose him named as a commissioner, though not present in the parliament, (which seemed difficult,) yet that he could be named as one of those who did in parliament treat and agree upon the matters there mentioned, without being present in parliament, was a supposition directly contrary to the record. The other record of 33 Edward I. was a direct proof that he was present. That of the third year of Edward II. amounted to a very strong evidence of his having been present in that parliament; since the supposition that he might be chosen one of the lords' ordainers, though absent, was much less probable than that he was present at the time he was chosen.

The record of the fiftieth year of Edward III., by which the sitting of John de Botetourt the grandson was proved, was in terms a direct proof that he was present in that parliament. He was summoned to it. The record says, the lord Latymer found in parliament certian lords, amongst whom John de Botetourt was named, his mainpernors. John de Botetourt must have been present as one of the mainpernors, for no person can become security for another's appearance without being actually present; and the record fixes it absolutely that the bail was given in parliament.

§ 48. In the case of the barony of Zouch of Harringworth, several proofs of sitting in parliament from the printed rolls were produced, which were admitted as evidence.

Min. of Com. of Priv. No. 7. to 11., and No. 15. and 27.

§ 49. With respect to dignities conferred by letters patent, the proper proof of their creation is by production of the original letters patent, which are matters of record. But where these are lost, which has frequently happened, other proofs will be admitted.

Proofs of a dignity by letters patent.

§ 50. By the statute, 13 Eliz. c. 6., it is enacted that all patentees, their heirs and successors, having any estate or interest in any lands, tenements, or hereditaments, granted by letters patent of king Henry VIII., king Edward VI., queen Mary,

king Philip and queen Mary, or by any of them, or by queen Elizabeth, at any time after the 4th February, 27 Henry VIII., or by queen Elizabeth, her heirs or successors, at any time thereafter to be granted, shall make and convey to and for them such claim or title by showing forth an exemplification, or *constat* under the great seal, of the enrolment of such letters patent, as if the same letters patent were pleaded and shown forth. And it was held by the court of exchequer in 30 Elizabeth, that this act extended to letters patent of creation of dukes, marquisses, earls, viscounts, and barons.

Page's case, 5 Coke's Rep. 52.

§ 51. In the claim to the marquisate of Winchester before the attorney general in 1796, the enrolments of letters patent of 30 Henry VIII. and 3 & 5 Edward VI. were held to be sufficient evidence of the original letters patent, which were lost.

Ante, ch. v.

§ 52. Where the creation and existence of the dignity is proved, the petitioner must then show that he is heir to the person first ennobled. But here it is not required that the evidence should be matter of record; it being sufficient to prove the descent of the claimant by the same evidence which would be required to prove the pedigree of a person claiming any other kind of real estate. No admissions, however, between contending claimants will be allowed, by the attorney general; but the whole case of each party must be fully proved by legal evidence.

Proofs of pedigree.

§ 53. Where a claim to a barony by writ, which has been in abeyance, is made by a sole surviving heir, the claimant must not only deduce and prove his own pedigree, from the person first summoned, but must also prove the extinction of all the descendants of the other coheirs. And when the claim is to a coheirship in a barony, the claimant must deduce and prove the pedigrees of all the coheirs; in order that the crown may know between what persons the dignity is in abeyance.

§ 54. The pedigrees of persons claiming dignities were formerly made out by the heralds, and admitted, upon their authority, by the house of lords.

§ 55. Thus in the case of the claim to the barony of Clifford, in 1691, by the earl of Thanet, his pedigree was made

out by the heralds; and it is said in the journals, that "The bishop of Salisbury reported from the lords' committees for privileges, that their lordships had considered the pedigree of Thomas earl of Thanet to the barony of Clifford, which was brought to their lordships by Mr. Gregory King, an herald sworn at the bar of the house, and attested by sir Thomas St. George and the other heralds: and their lordships were of opinion, that Thomas, late earl of Thanet, was the sole lineal and right heir to Robert de Clifford, first summoned to parliament as lord de Clifford by writ. And that the said title and barony of lord Clifford did of right belong to the said earl of Thanet, and his heirs. To which the house agreed." V. xiv. 615. Vide id. v. xv. 205.

§ 56. By a standing order of the house of lords, made in 1767, it is declared 1°. that it is the duty of the heralds to take exact accounts, and to preserve regular entries in their books of office, of the peers and peeresses of England, and their descendants. 2°. That garter do attend on the first admission of a peer, whether by creation, or descent, and do deliver in a pedigree of such peer, to be referred to the committee of privileges, who shall examine and report the same; which report shall be filed by the clerk, and kept among the records of the house; and a copy kept at the herald's office, without prejudice however to any person who may be aggrieved by any error therein. 3°. That every peer, and peeress in her own right, may be at liberty to make proof of his or her pedigree, before the committee of privileges; and to obtain the like entry thereof. Journ. v. xxxi. pa. 583. 4. 8. & 94.

§ 57. Where the pedigree of a person, claiming a peerage, is not recorded in the manner required by the above order, it will not know be admitted, upon the bare authority of the heralds; but must be proved by evidence strictly legal, and such only as would be admitted, as evidence of pedigree, upon a trial before a jury, in a court of common law.

It would be impossible to enumerate all the kinds of evidence by which a pedigree may be proved; but some of the principal ones shall be pointed out.

§ 58. While the feudal law prevailed, whenever a person who held lands *in capite* of the king, by knight service, or in Inquisitiones post mortem.

socage died seised of them, a writ of *diem clausit extremum*, or
Fitz. N. B. 251. a special writ of *mandamus* issued, directed to the escheator; commanding him by the oaths of honest and lawful men to enquire what lands and tenements the said person held of the king in chief, and by what services, and who was his next heir, and of what age, and to return the inquisition into the court of chancery.

§ 59. The inquisitions taken under these writs are preserved in the tower, and the rolls chapel, They are called *Inquisitiones post Mortem*, and form a most extensive and useful source of evidence of the pedigrees of all the great ancient families. The evidence of an *Inquisitio post Mortem* is however not conclusive, but may be repelled by other evidence. And where there appears to have been any irregularity in the proceedings, it will be totally rejected.

Collins, Appendix 400. § 60. In the case of the barony of Powis, in 1731, three *inquisitiones post mortem* were produced; but it is said in the printed case, that the jury's finding in two of them exceeded the authority of the writ: and as to the third, a *supersedeas* had issued, and vacated it. And that in a cause in the court of wards, that court, by a solemn decree, reciting that the said three inquisitions had been traversed, and in due form avoided, declared them insufficient.

Parish registers. § 61. Upon the abolition of military tenures, at the restoration of king Charles II. The practice of taking *inquisitiones post mortem* ceased; and from that period the parish registers, which were first established in the year 1538, are the chief sources of evidence of baptisms, marriages, and burials

Lloyd v. Passingham. 16 Ves. 59, § 62. In a modern case, where the register of the parish of Pancras was produced in evidence, lord Eldon said: "None of these registers have been kept, until lately, according to law. By the canon law the clergy are required every week to form and sign these registers; and to send annually a duplicate to the ordinary; which duplicate being by the law required to remain with him, would itself be evidence. That was never done, and in the Chandos case, one noble lord, now deceased, was disposed on that ground to reject a great number of registers, as not having been kept according to the

canons. The house, however, thought that the subject having fallen into so loose a state, could not in that instance be taken with such strictness. From what passed in that case, there is now considerable security for the authenticity of evidence of pedigree in future; as partly upon my suggestion, the bishops came to a determination to require the transmission of these duplicates. Vide stat. 52. Geo. 3. c. 146.

§ 63. By a late order of the house of peers, all parish registers offered in evidence in peerage cases must be produced by the rector, or vicar of the parish; or by some person entitled to the custody of them.

§ 64. The books of the herald's office contain evidence of pedigree of different kinds. First, original visitation books, or, where the originals are lost, authentic copies of them. Secondly, Funeral certificates, when signed by respectable persons, connected with the family of the deceased.* Thirdly, Pedigrees entered at the office, signed by the persons entering them, and witnessed by a herald. But the private collections of heralds, made for their own use, though deposited at the herald's office, are not evidence. Books of the herald's office. 3 Comm. 105.

65. In the case of the barony of Willoughby of Parham, a manuscript book from the herald's office, called "Arms and Descents of Nobility," marked E 16, was received as evidence of pedigree. But in the case of the barony of Zouch of Harringworth, the committee of privileges rejected that book, as not being admissible evidence. Min. of Comm. of Privileges, p. 100. 205.

§ 66. Judicial proceedings are in many cases admitted as evidence of pedigree. Thus a degree of the court of chancery, and a verdict at law, may be evidence. As also answers and depositions in suits in chancery, but the bill must be first proved. Judicial proceedings.

§ 67. A special verdict, in a suit between other parties, will not however be received as evidence of a pedigree, because it is *res inter alios acta*. The same point was held in Neale v. D. of Athol. Stra. Rep. 1151.

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* Vide the case of the earldom of Banbury, infra, and minutes of the committee of privileges in the case of the barony of Roos, pa. 184. 338.

Infra. the case of the earldom of Banbury, respecting depositions of witnesses, in a suit in chancery.

Deeds. § 68. Marriage settlements and other deeds are admitted as evidence of pedigree. But it must be shown that such deeds or instruments were found among the muniments of the family, and as such delivered to the person who produces them.

Wills and administrations. § 69. Wills are admitted as evidence of pedigree, where they mention any thing respecting the children or other relations of the testator. And letters of administration are also received as evidence of pedigree.

Inscriptions on tombs, &c 13 Ves. R. 144. § 70. Inscriptions on tombstones are allowed as evidence of pedigree, as it cannot be supposed that the relations of a deceased person would permit an untrue account of him to be placed over his grave.

Idem. § 71. Engravings on rings have also been admitted as evidence of pedigree, upon the presumption that a person would not wear a ring upon which was an error.

Hearsay declarations. § 72. Although hearsay evidence is not generally admitted in other cases, yet it is received in support of a pedigree; because the exclusion of such evidence, in cases of this kind, would prevent all testimony whatever. For the evidence of any living witness of what passed within the short time of his own memory, would often be insufficient; and there is no other way of knowing the evidence of deceased persons than by the relation of others, of what they have been heard to say.

5 Term. Rep. 719. § 73. In a modern case Mr. justice Buller said, that hearsay evidence was constantly allowed in all cases of pedigree, though from persons not of the family, But lord Kenyon differed from him, and said, "I admit that declarations of the members of a family, and perhaps of others living in habits of intimacy with them, are received in evidence as to pedigrees; but evidence of what a mere stranger has said, has ever been rejected in such cases."

13 Vesey, 143. § 74. Lord Erskine has observed that courts of law are obliged, in cases of pedigree, to depart from the ordinary rules of evidence; as it would be impossible to establish descents, according to the strict rules by which contracts

are established, and subjects of property regulated; requiring the facts from the mouth of the witness, who has the knowledge of them. In cases of pedigree therefore, recourse is had to a secondary sort of evidence, the best the nature of the subject will admit, establishing the descent from the only sources that can be had. Perhaps while the feudal tenures prevailed, with the ancient *inquisitiones post mortem*, opportunities of establishing descents were afforded, much superior even to the modern means, by the register of births and baptisms. The heads of families, upon those occasions, made solemn declarations, which were matter of record, and threw great light upon questions of inheritance.*

Proofs of marriage.

§ 75. It has always been held that direct and positive proof of the fact of marriage is not necessary, in cases of pedigree; but that the acknowledgment of the parties, their reception by their families as married persons, their cohabitation, public reputation, and various other circumstances are admissible, as evidence of marriage.

§ 76. In the printed case of the barony of Say and Sele in 1781, it is stated, that John Twisleton, the claimant's father, was married to Anne Gardner, the claimant's mother, in 1733, at the Fleet Prison, where marriages were at that time frequently celebrated. And it is there said that in support of a marriage of this nature, where witnesses present at the marriage could not, at that distance of time, be expected to be produced, evidence of declaration and avowal of the parties in their lifetime, by will or otherwise; as also evidence of public reputation, during the life, and after the death of the parties, were ample proofs of a legal marriage.

§ 77. In the above case a certificate of the marriage, in the hand-writing, and signed by the then officiating minister of the Fleet, was offered in evidence; but it does not appear whether it was admitted or not. The marriage was however allowed to be good.

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* See Mr. Justice Laurence's answer to a question put to the judges in the case of the earldom of Berkeley. Philipps's Law of Evidence.

Read v. Passer. Peake's cases, 231.

§ 78. In some modern cases a similar certificate has been admitted. But lord Kenyon held that the certificate of a marriage celebrated at the Fleet, signed by the officiating minister, was not admissible evidence.

Lloyd v. Passingham, 16 Ves. 62.

§ 79. In a subsequent case Mr. justice Heath admitted the Fleet books as evidence of a marriage. And in a suit in chancery to impeach the verdict obtained on that and other evidence, lord Eldon said, "I give no opinion that the Fleet register is evidence; but I am not prepared to say it may not be received as evidence of a fact, and I can suppose cases in which such evidence might be received."

§ 80. By the statute 26 George II. c. 33., commonly called the marriage act, it is enacted (§ 8.) that all marriages solemnized after the 25th day of March, 1754, in any other place than a church or public chapel, unless by special licence, or that shall be solemnized without publication of banns, or licence, shall be null and void. By the fourteenth section it is enacted, that the church-wardens and chapel-wardens of every parish or chapelry shall provide proper books, in which all marriages there solemnized shall be registered. And that all marriages shall be solemnized in the presence of two or more credible witnesses, besides the minister who shall celebrate the same. And that immediately after the celebration of every marriage, an entry thereof shall be made in such register, to be kept as aforesaid, and shall be signed by the minister, and also by the parties married, and attested by such two witnesses.

21 Geo. 3. c. 53.

§ 81. It has been repeatedly held that this act does not take away the ancient mode of proving a marriage by presumptive evidence. Thus lord Mansfield has said: "In a suit in the ecclesiastical court for jactitation of marriage, perhaps it may be necessary to prove that all the solemnities of the marriage act have been punctually and regularly complied with; but God forbid that in other cases (the legitimacy of children and the like) the usual presumptive proofs of marriage should be taken away by this statute. It was canvassed in parliament at the time when the act was made, and uni-

1 Black. Rep. 367.

versally agreed by all those whose opinions were worth having, that it would not become necessary to prove the publication of banns, &c.

§ 82. In a subsequent case the same judge said: "The clauses in the marriage act relative to registers are of infinite utility to the kingdom; they were meant as well to prevent false entries, as to guard against illegal marriages, without licence or the publication of banns. The registers are directed to be kept as public books, and accompanied with every means of authenticity. But besides facilitating and ascertaining the evidence of marriage, they were intended for other wise purposes. They are of great assistance in the proof of pedigrees, which has become so much more difficult since *inquisitiones post mortem* have been disused, that it is easier to establish one for five hundred years before the time of Charles II. than for one hundred years since his reign. But this advantage would be lost, and it would be very prejudicial, if the act was so construed as to render the proof of marriages more difficult than formerly. I take it for granted, that the law stands as it did before in that respect. Registers are in the nature of records, and not to be produced, nor proved by subscribing witnesses. A copy is sufficient, and is proof of a marriage in fact between two parties, describing themselves by such and such names and places of abode; though it does not prove the identity. An action for criminal conversation is the only civil case where it is necessary to prove an actual marriage; in other cases cohabitation, reputation, &c. are equally sufficient since the marriage act, as before." Birt v. Barton, Doug. R. 171.

§ 83. Lord Kenyon has admitted this doctrine in a case at *nisi prius*, in which he declared his opinion, that though the marriage act had introduced registers of marriage, that registration made no part of the validity of a marriage; it went but in proof of it. And that now, as well as before the passing of that act, cohabitation, acknowledgment, and reception by the family, was good and admissible evidence of a marriage; though no register whatever was produced." 1 Espinasse's Rep. 214.

§ 84. A marriage had in a foreign country is good, provided it appear to have been celebrated according to the *lex loci.* And lord Hardwicke has also observed, that the fact of a foreign marriage may be established by the sentence of a foreign court, having competent jurisdiction, in a suit instituted there. And this, generally speaking, was conclusive by the law of nations; for otherwise the rights of mankind would be very precarious and uncertain.

1 Ves. Rep. 159.

§ 85. In the discussion of a late divorce bill, in the house of lords, lord Eldon intimated a doubt respecting the validity of the marriage, which was celebrated at Rome by a Protestant clergyman, both parties being Protestants; and said that where persons were married abroad it was necessary to show that they were married according to the *lex loci,* or that they could not avail themselves of the *lex loci,* or that there was no *lex loci.* Some days after, a Roman Catholic clergyman was produced at the bar of the house, who swore that at Rome two Protestants could not be married according to the *lex loci;* because no Catholic clergyman would celebrate marriage between two Protestants. The marriage was held to be good.

Earldom of Anglesey. Printed case, 1771.

§ 86. Arthur Annesley petitioned the king in 1770, for the titles and dignities of earl of Anglesey and baron Newport Pagnel, stating that king Charles II. had granted to Arthur Annesley those honors, to him and the heirs male of his body. That Richard earl of Anglesey, the heir male of the above named Arthur, succeeded to the honors on the death of Arthur in 1737, and was summoned to and sat in parliament in 1738, and to the time of his death in 1761.

That the said earl Richard, in the year 1715, being then of the age of twenty-one, married Ann Prust, at Northam in the county of Devon, with whom he lived till the year 1725, when they separated.

That in 1737 Arthur earl of Anglesey, the predecessor of earl Richard, died; whereupon earl Richard entered on the family estates, took his seat in the house of peers, both in England and Ireland, and fixed his residence at Camolin park, in the county of Wexford.

That in August 1741, Ann Prust countess of Anglesey died without issue; and earl Richard, as soon as he heard of her death, hastened to Camolin park, where he was married, on the 15th September 1741, to Juliana Donovan; the ceremony being performed by Lawrence Neale, his lordship's chaplain, in the presence of Charles Kavannagh, his steward, and Nixon Donovan, the brother of Juliana. But the marriage was kept secret on account of the perplexed situation of the earl's affairs, and his disputes with some branches of his own family.

That earl Richard had issue by his lady four children, the claimant, who was born in 1744, and three daughters.

That in 1752, earl Richard being apprehensive lest his family should be exposed to the hazard that attends a private marriage, of which all the witnesses, except the clergyman, were then dead; resolved to make his marriage more authentic, by an open celebration of it; and Mr. Neale, who had formerly performed the ceremony, having come to Camolin park, his lordship appointed the 8th October 1752 for the republication of the marriage, which took place accordingly, in the presence of nine gentlemen and ladies of the neighbourhood; all of whom signed the following certificate.—"We the undernamed persons were present this 8th day of October 1752, when the right honorable Richard earl of Anglesey acknowledged he had intermarried with Juliana Donovan countess of Anglesey on the 15th day of September 1741. And at the same time the said countess of Anglesey produced the certificate of the said marriage, in our presence; and he the said Richard earl of Anglesey declared he was determined to have the said marriage ceremony performed over again, to prevent any future disputes in his lordship's family; as most of the witnesses that were present at that marriage are since dead. And we accordingly saw his lordship married over again, this present day above mentioned."

From this time the earl continued to live publicly with Juliana his countess, as his wife, and to educate the petitioner, and his other children by her, suitable to his rank, down to

his death in 1761, being uniform to the last hour in acknowledging the marriage, and legitimacy of his children.

About two years before his death, earl Richard made a new will in which, conformable to the former wills he had made, he gave to Juliana his countess, by the description of Juliana countess of Anglesey his wife, a yearly rent charge of 1000*l.* in bar of dower; and devised all his estates to trustees, in trust for the petitioner for life, with remainder to his first and other sons in tail male.

Earl Richard died in 1761, leaving the petitioner his only son and heir, who during his minority was called upon to vindicate his Irish honor, upon a claim interposed by John Annesley, as lineal heir of the original grantee; which was referred to the then attorney and solicitor general of Ireland, who on the 21st September 1765, after a most voluminous examination of witnesses on the spot, and near four years' deliberation, in which the petitioner's legitimacy was the only question, reported that the Irish honors were legally vested in the petitioner, as only son and heir male of the body of Richard late earl of Anglesey, in consequence of which the petitioner was duly summoned in virtue of the Irish honors, to the parliament of Ireland, and took his seat in the house of peers of that kingdom.

That soon after the claimant petitioned his majesty for a writ of summons to call him to the parliament of Great Britain, by the stile and title of earl of Anglesey, by immediate descent from the late earl Richard his father.

This petition having been referred to his majesty's attorney general (Mr. De Grey), and the report and evidence laid before the attorney and solicitor of Ireland, having accompanied the reference; he proceeded to take that report, and the proofs annexed to it into consideration, with such other evidence as was laid before him by the petitioner. And reported that his majesty might properly, if he should so please, order the usual writ of summons to issue for calling the petitioner to the parliament of Great Britain. It was referred back to the attorney general to reconsider his report, and to deliver his opinion, on such original evidence as the petitioner should

think fit to lay before him, what might be properly done on the petition.

Previous to this last reference a petition had been presented to his majesty in the name of Dorothea Du Bois, on behalf of herself and her two sisters, the daughters of Ann Simpson, who had claimed to be the wife of earl Richard, praying that no summons might issue to call the petitioner up to the British parliament, till her suit, then depending in the ecclesiastical court, in which the validity of her mother's marriage was agitating against the petitioner's mother, should be determined.

This last petition was also referred to the attorney general, who proceeded to take both petitions into consideration, and who made his second report on both petitions, recapitulating the whole evidence on both sides, and discussing and deciding upon every question in the petitioner's favor, and again concluding, "That from the best consideration he had been able to give the case, upon such proofs as had been laid before him, he was of opinion that the petitioner was the legitimate son of the late earl of Anglesey, and as such entitled to the English honors of earl of Anglesey, &c. and that there was no just or reasonable ground, at the instance of the petitioner Dorothea, to protract his enjoyment of these honors, or to suspend his seat, as a member of the house of peers, till a future determination of a suit in the ecclesiastical court, depending between other parties, in which he had no concern, and which had been carried on in such a manner as to leave it uncertain when it would, if it should ever, be brought to a decision; and which decision, when obtained, would not be applicable to the subject matter of the reference.

The case having been referred to the committee of privileges was there heard for several days, and the committee resolved by a majority of one (thirteen peers being present) that the claimant had no right to the titles, honors, and dignities claimed by his petition, which resolution was, upon a division, adopted by the house.* 22 April, 1771.

* It is stated by Mr. Andrew Stuart, in his letters to lord Mansfield, on the Douglas case, that in the Anglesey case a majority of the peers conceived

§ 87. Soon after this resolution, three persons claimed the Irish dignities of viscount Valentia and baron Mountnorris, and their petitions having been referred to the house of peers of Ireland, a very long examination into the proofs of the private marriage in 1741 took place there; and the house appears to have been satisfied that such marriage had been duly celebrated; for it was resolved that none of the claimants had proved a right to those dignities. So that Arthur lord Valentia was in fact held to be the legitimate son of Richard earl of Anglesey, by the house of peers of Ireland, in direct contradiction to the resolution of the house of peers of Great Britain.

Proofs of Legitimacy.

§ 88. Every person born in lawful wedlock is *prima facie* legitimate, for the maxim of the civil law, *pater est quem nuptiæ demonstrant*, is admitted in England. This presumption of legitimacy may however be repelled in many cases; for if it be proved that the husband was beyond sea during the whole time of the wife's pregnancy, the issue will not be deemed legitimate; and since Penderell's case in 5 George II. it has been settled that not only proof of being out of the kingdom, but also every other kind of evidence, tending to prove the impossibility, or even improbability of the husband's being the father, is admissible. And this doctrine was fully admitted and acted upon in the following case: —

1 Inst. 126. a. n. 2.

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that the names of the witnesses to the certificate were forged; the certificate having been long in the possession of lady Anglesey; and held that this forgery had the effect of vitiating and discrediting the whole of the evidence. But lord Mansfield was of a different opinion, on this ground, that the evidence, as to the certificate, only amounted to a doubt or suspicion of forgery. And that where there was on the one side positive, clear, and consistent parol evidence, and on the other only doubt or suspicion of forgery, he thought it the duty of every lord to whose mind the matter appeared in that light, to be governed by the parol evidence; and not rashly to presume that lady Anglesey, and several of the witnesses in the cause, were perjured. That it would be giving too great an authority to a mere doubt or suspicion of forgery, to allow it to outweigh the whole of the parol evidence; and to infer an imputation of perjury against lady Anglesey, and the other witnesses, who had deposed in support of the marriage, and of the certificate. But lord Mansfield's doctrine has been confirmed by lord Eldon, in the case of Lloyd v. Passingham, 16 Vesey's Rep. 59.

§ 89. Williams Knollys claimed the earldom of Banbury, stating the following case. That William lord Knollys and viscount Wallingford was created earl of Banbury, by letters patent dated 2 Charles I. in which a precedence was given to him over some persons who had been created earls, a short time before. And the house of lords having objected to this circumstance; the king sent them a message, showing the occasion of his granting this precedence; and his desire that the earl, being old and childless, might enjoy it during his time.

Earldom of Banbury. Printed case, 1808.

The earl died in 1632, and by an inquisition taken at Burford, it was found that he died without heirs male of his body; but by another inquisition taken seven years after at Abingdon, it was found that Edward then earl of Banbury was his son and next heir; and that he left another son named Nicholas.

The first of these inquisitions was found in consequence of an opinion which then prevailed, that the said Edward and Nicholas were illegitimate. Not that during the gestation of them their mother lived apart from her husband, and that they were without access to each other; but because lord Banbury was greatly advanced in years, and that his wife, who was comparatively young, was suspected of an illicit intercourse with lord Vaux, to whom she was married after the death of the earl; and that the birth of those children was concealed from lord Banbury.

Edward the eldest son of lord Banbury died under age, and his brother Nicholas, claiming to be earl of Banbury, sat in the house of lords in the convention parliament, on the restoration of king Charles II. But in that parliament it was moved, that there being a person then sitting in the house as a peer, who had no title to be a peer, namely, the earl of Banbury, it was ordered that the business should be heard at the bar by counsel. Nothing however appears from the journals to have been done in pursuance of this motion, lord Banbury continuing to sit, and being put upon committees during the whole of that session.

This Nicholas not having received a writ of summons to the ensuing parliament, presented a petition to the king, stating himself to be the son and heir to William earl of Banbury, and praying a writ of summons to parliament, as earl of Banbury; which being referred to the house of lords, the committee of privileges resolved in 1661, that he was a legitimate person.

It appears from the minutes of the committee of privileges, that four witnesses were examined, who all swore that the countess of Banbury was delivered of two sons, Edward and Nicholas, at Harrowden, the seat of lord Vaux. That their birth was not kept secret in the house; and they were considered as the children of lord Banbury. One of the witnesses being asked how old lord Banbury was, answered she knew not, but that he rode a hawking and hunting within half a year before his death, and in all other sports. All the witnesses swore that lord and lady Banbury lived together, to the time of lord Banbury's death.

The house upon receiving this report resolved that the cause should be heard at their bar, which accordingly took place, when the case was again referred to the committee of privileges, who after hearing counsel and witnesses, resolved that the earl of Banbury was, in the eye of the law, son of the late earl; and that the house of peers should therefore advise the king to send him a writ of summons.

Nothing was done by the house upon receiving this report; but some time after a bill was brought in to declare Nicholas called earl of Banbury to be illegitimate, which was not proceeded in.

Upon the meeting of parliament in 1669, the house took notice that the earl of Banbury's name was not in the list by which the lords were called; and it was referred to the committee of privileges to examine why his name was left out, he having formerly sat as a peer. The committee reported that having spoken with sir Edward Walker, principal king at arms, who delivered in the list, he had produced a book out of the herald's office, where it appeared that the last earl of Ban-

bury died in 1632, and having had two wives left no children. He likewise produced a roll, being a procedure of the king and peers to parliament, in 1640. In which list there was no mention of the earl of Banbury.

Nicholas lord Banbury died in 1673, and was succeeded by his son Charles, who having in 1692 killed a person in a duel, was indicted by the name of Charles Knollys, for murder, and having removed the indictment into the court of king's bench, he there pleaded a misnomer, for that he was earl of Banbury.

A few days after the indictment was found, Charles Knollys, by the description of Charles earl of Banbury, presented a petition to the house of lords, praying to be tried by the peers of the kingdom; where after a long discussion the question was put whether the petitioner had any right to the title of earl of Banbury, which was resolved in the negative, and the petition dismissed. 12 January 1692.

In the court of king's bench the attorney general replied to the plea of misnomer, that the said Charles had petitioned the house of lords, alleging that he was earl of Banbury, and praying to be tried by his peers; and that it was resolved by the lords that the said Charles had not any right to the title of earl of Banbury; to which lord Banbury demurred. The court of king's bench allowed the demurrer, upon the principle that the house of lords had no jurisdiction in questions of peerage, but by reference from the crown. The indictment was quashed. Skinner's Rep. 517. Vide infra, § 99.

In the year 1697, this Charles Knollys petitioned king William for his title, and his petition being referred to the house of lords, the committee of privileges reported that the house had five years before resolved that the petitioner had no right to the title of Banbury. — Charles Knollys died in the year 1740, to whom the claimant was grandson and heir male, and therefore prayed a writ of summons to parliament as earl of Banbury; or that the necessary steps should be taken for a full investigation of his case.

This petition having been referred to the attorney general

(sir V. Gibbs), he reported that two questions arose in this case. 1st, Whether the resolution of the house of lords upon the petition presented to them in 1692 by Charles Knollys was conclusive. 2d, Whether the petitioner had made out his claim to the dignity by the evidence produced before him.

As to the first he was of opinion that the resolution of the house of lords in 1692 was not a conclusive judgment against the said Charles.

Upon the second it appeared to him that the legitimacy of Nicholas was left in a considerable degree of doubt.

The petition and report were referred by his majesty to the house of peers, and the case was heard before the committee of privileges for several days, in the years 1808, 1809, and 1810.

The counsel for the claimant offered to give in evidence the minutes of the committee of privileges upon the claim of Nicholas Knollys in 1661, to which the attorney general objected, but his objection was disallowed, and the minutes received.

After the attorney general's report, it was discovered that a suit in chancery had been instituted by William earl of Salisbury as the next friend and guardian to Edward the second earl of Banbury, in which five witnesses were examined, four of whom appeared from their depositions to have been in the service of the first earl of Banbury, for several years before the birth of his two sons, and also when they were born, and to the time of the death of the said earl: and the other was a physician, who had been in intimacy with him for several years prior to the birth of the eldest of his two sons, and continued to be connected with him till his death. The counsel for the claimant offered to give these depositions in evidence; but the attorney general objected to them on two grounds. 1st, Because the suit was *res inter alias acta;* and 2d, Because it did not appear that the witnesses were connected, in the manner stated by themselves in the depositions, with the persons respecting whom they de-

posed, the admission of hearsay evidence in cases of pedigree being confined to relations interested in the state of the family and persons intimately connected with it. The committee of privileges after consulting the judges, rejected these depositions.

It was afterwards discovered that Charles Knollys had presented a petition to king George II. in 1727, claiming the dignity of earl of Banbury, which having been referred to the then attorney general sir Philip Yorke (afterwards lord Hardwicke), he reported the facts, and concluded that as the house of lords, in their representation to king William in 1697, expressly called their resolution in 1692 a judgment of their house; and on that account declined entering into the merits of the reference made to them by his said majesty; whether under these circumstances his majesty would think fit then to make a new reference to the house of lords, was a consideration, not of law, but of prudence; which must be left to his majesty's royal determination. — No reference was made.

The attorney general gave in evidence an indenture dated 4th March, 1630, between William earl of Banbury and Elizabeth his wife of the one part, and sir Robert Knollys, who was nephew to lord Banbury, of the other part: whereby the uses of a fine levied by lord and lady Banbury of the manor of Rotherfield Greys in Oxfordshire, which had been granted by the crown to the father of lord Banbury and the heirs male of his body, as a reward for services, so that it was within the protection of the statute 34 and 35 Henry VIII. c. 20. were declared to sir Robert Knollys in fee, and observed that the estate had continued in the possession of sir Robert Knollys under that deed, and had never been claimed by Nicholas Knollys, as the heir male of the body of the first grantee; who might if he could prove his legitimacy have recovered it back.

The attorney general also produced a book from the herald's office, containing funeral certificates in which was entered a certificate of the funeral of William earl of Banbury, stating that he had been twice married, and never had

any issue, but it not appearing that the certificate from which this entry was made was signed by any relation of the deceased, or by the chief mourner; it was rejected.

The will of William earl of Banbury was produced, in which no mention was made of Edward or Nicholas Knollys.

Lastly, the attorney general produced a deed executed by lord Vaux and the countess of Banbury, then the wife of lord Vaux, by which lord Vaux settled an estate on Nicholas Knollys, who is thus described in the deed: — "The right honorable Nicholas now earl of Banbury, sonne of the said countess of Banbury, heretofore called Nicholas Vaux, or by which soever of the said names or descriptions the said Nicholas be or hath been called reputed or knowne."

In the sessions of 1811 this case was argued by the lords in the committee of privileges for several days. Lord Erskine spoke first; he stated the case, and concluded by moving that the committee should resolve that the claimant had made out his title.

He was answered by the earl of Radnor, lord Redesdale, lord Ellenborough and lord Eldon, who were all against the claim, upon the principle that the acknowledgment of the parents is the first and most essential evidence of legitimacy; and that here the birth of the children appeared to have been unknown to the earl of Banbury.

Lord Ellenborough said it appeared most clearly from the evidence which had been produced that William earl of Banbury was ignorant of the birth of Edward and Nicholas Knollys. He was married in 3 James, which was in the year 1606, and Edward Knollys was stated to have been born in April 1627, when lord Banbury was upwards of eighty years of age, and Nicholas was born in 1630. So that when king Charles I. stated to the house of lords, that lord Banbury was old and childless, and when lord Banbury himself, by taking the precedence granted to him in the patent of creation of the earldom, admitted the fact, Edward Knollys was born, could it be supposed that the king and lord Banbury should concur in such a gross falsehood; and if they did, was it probable that so singular an event as the birth of a child,

after twenty-one years' marriage, to so old a man, should be unknown to the peers present, if it had not been then concealed. That the evidence given before the committee of privileges in 1661 was unsatisfactory, none of the witnesses proving that lord Banbury knew that his lady lay in. And the report that Nicholas was, in the eye of the law, son of the late earl, was founded on the doctrine laid down by lord Coke respecting legitimacy. This clearly appeared from the following passage in the minutes of the committee of privileges: "Counsel — We have cleared title. Pray he may enjoy the liberty and privilege of peer. Coke 1 Inst. 244., not to be disputed whether son or no if father be within the four seas, though wife be in adultery. Mr. attorney *pro rege* confesseth the law cleare."

Now the passage relied on from lord Coke was clearly erroneous, as was shown by Mr. Hargrave in his note on another part of that work, 126. a. in which it was said; "that not only proof of being out of the kingdom, but also every other kind of evidence tending to prove the impossibility, or even improbability, of the husband's being the father was admissible."

The committee of privileges in 1662 appeared to be perfectly satisfied that Nicholas was not in fact the son of lord Banbury; but conceived that as lord Banbury was within the four seas, the law deemed Nicholas legitimate.

The suit in chancery to perpetuate the testimony of witnesses appeared to be a mere collusion. There were many better modes of establishing the legitimacy of Edward and Nicholas Knollys, and it was a very extraordinary circumstance that lady Banbury was not examined; as she was the properest person to establish the legitimacy of her own children.

The conduct of lord Banbury in the last years of his life most clearly proved that he was ignorant of the birth of Edward and Nicholas Knollys.

The conveyance of Rotherfield Greys in 1630, to sir Robert Knollys, who was lord Banbury's nephew, and next heir male, to whom it would have descended if lord Banbury

had no son; and the disposition of all his personal estate by his will, were acts, which no person, having two sons born to him in his old age, could be supposed to have done. And if Nicholas could have proved his legitimacy, it is impossible to suppose that he would have submitted to the loss of a considerable estate; which being granted as a reward for services, could not be aliened by lord Banbury; but that he would have taken some steps to recover it; which he never did.

The deed executed by lord Vaux and lady Banbury after their marriage, which was acknowledged by lady Banbury, when it was enrolled in chancery, contained positive proof, from the manner in which Nicholas was described, that he had first borne the name of Vaux.

The determination of the house of lords in 1692, that Charles Knollys had no right to the title of earl of Banbury, was valid, though not absolutely conclusive on Charles Knollys, and the court of king's bench ought to have submitted to it.

The report of lord Hardwicke in 1727, if it had been known to the attorney general, would probably have induced him to make a similar one; and not to recommend a reference to the house of lords. If *he* had been attorney general he certainly would not, after that report, have recommended a reference.

Lord Eldon contended, that a child born in wedlock might be bastardized by evidence showing the total impossibility of its being begotten by the husband, and cited a case between the parishes of St. Andrew and St. Brides, reported by sir John Strange, vol. i. 51., and the case of Goodright *v.* Saul, 4 Term Reports, 356.

Lord Erskine in reply insisted that by the civil and canon law, and also by the law of England, a child born in wedlock could only be bastardized by evidence of non-access, or absolute impotence of the husband; and in this case neither of those facts had been even attempted to be proved, that the legitimacy of such a child was *presumptio juris et de jure;* and there was no case in the law of England, where the husband had access to his wife, in which the improbability of a child's

having been begotten by the husband, however strongly proved, had been held sufficent to bastardize such child.

The committee of privileges proposed the following question to the judges: "Whether the presumption of legitimacy arising from the birth of a child during wedlock, the husband and wife not being proved to be impotent, and having opportunities of access to each other, during the period in which a child could be begotten and born in the course of nature, can be rebutted by any circumstances inducing a contrary presumption?"

The lord chief justice of the court of common pleas having conferred with his brethren, informed the committee that they were unanimously of opinion:

"That the presumption of legitimacy arising from the birth of a child during wedlock, the husband and wife not being proved to be impotent, and having opportunities of access to each other, during the period in which a child could be begotten and born in the course of nature, may be rebutted by circumstances inducing a contrary presumption."

The following question was then put to the judges: "Whether the fact of the birth of a child from a woman united to a man by lawful wedlock, be always, or be not always by the law of England *prima facie* evidence that such child is legitimate; and whether, in every case in which there is *prima facie* evidence of any right existing in any person, the *onus probandi* be always, or be not always, upon the person or party calling such right in question, whether such *prima facie* evidence of legitimacy may always, or may not always, be lawfully rebutted by satisfactory evidence, that such access did not take place between the husband and wife, as by the laws of nature is necessary in order for the man to be in fact the father of the child; whether the physical fact of impotency, or of non-access, or of non-generating access (as the case may be) may always be lawfully proved, and can only be lawfully proved by means of such legal evidence as is strictly admissible in every other case, in which it is necessary by the laws of England that a physical fact be proved?"

The following question was also proposed to the judges:

" Whether evidence may be received and acted upon to bastardize a child born in wedlock, after proof given of such access of the husband and wife, by which, according to the laws of nature, he might be the father of such child; the husband not being impotent, except such proof as goes to negative the fact of generating access?

" Whether such proof must not be regulated by the same principles as are applicable to the legal establishment of any other fact?"

To which the judges answered: " That after proof given of such access of the husband and wife, by which according to the laws of nature he might be the father of the child (by which they understood proof of sexual intercousre between them), no evidence could be received, except it tended to falsify the proof that such intercourse had taken place, such proof must be regulated by the same principles as were applicable to the establishment of any other fact." Afterwards, the following questions were put to the judges:

" 1. Whether, in every case where a child is born in lawful wedlock, sexual intercourse is not by law presumed to have taken place, after the marriage, between the husband and wife (the husband not being proved to be separated from her by sentence of divorce), until the contrary is proved by evidence sufficient to establish the fact of such non-access; as negatives such presumption of sexual intercourse, within the period when, according to the laws of nature, he might be the father of such child?

" 2. Whether the legitimacy of a child born in lawful wedlock (the husband not being proved to be separated from his wife by sentence of divorce) can be legally resisted, by the proof of any other facts or circumstances than such as are sufficient to establish the fact of non-access during the period within which the husband, by the laws of nature, might be the father of such child; and whether any other question but such non-access can be legally left to a jury, upon a trial, in the courts of law, to repel the presumption of the legitimacy of a child so circumstanced?"

The lord chief justice of the court of common pleas delivered the unanimous opinion of the judges as follows:

"1. That in every case where a child is born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, sexual intercourse is presumed to have taken place between the husband and wife, until that presumption is encountered by such evidence as proves, to the satisfaction of those who are to decide the question, that such sexual intercourse did not take place at any time, when by such intercourse the husband could, according to the laws of nature, be the father of such child.

"2. That the presumption of the legitimacy of a child born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, can only be legally resisted by evidence of such facts or circumstances as are sufficient to prove, to the satisfaction of those who are to decide the question, that no sexual intercourse did take place between the husband and the wife at any time when, by such intercourse, the husband could, by the laws of nature, be the father of such child. Where the legitimacy of a child in such a case is disputed, on the ground that the husband was not the father of such child, the question to be left to the jury is, whether the husband was the father of such child; and the evidence to prove that he was not the father, must be of such facts and circumstances as are sufficient to prove, to the satisfaction of a jury, that no sexual intercourse took place between the husband and wife at any time, when by such intercourse, the husband, by the laws of nature, could be the father of such child.

The non-existence of sexual intercourse is generally expressed by the words "non-access of the husband to the wife;" and we understand those expressions, as applied to the present question, as meaning the same thing; because in one sense of the word access, the husband may be said to have access to his wife, as being in the same place, or the same house; and yet, under such circumstances, as, instead of proving, tend to disprove that any sexual intercourse took place between them."

The case was again argued by the lords in the committee of privileges, on the 1st July, 1812. Lord Erskine contended, upon the authority of the answers of the judges, that the claimant was entitled to the dignity. On the 7th of the same month the case was adjourned to the next session; and on the 26th February and the 8th and 9th March, 1813, the case was argued by the lords in the committee of privileges.

Lord Eldon delivered his opinion against the claim, of which the following is but a very imperfect note by the late Mr. Litchfield.

" If the house can convince itself that Nicholas, the claimant's ancestor, was not, *de facto*, the child of William earl of Banbury, we ought to see whether he was so *de jure*.

" The house, in 1692, came to the resolution, that the then petitioner claiming under Nicholas had not any right to the title of earl of Banbury. It is to be lamented that we did not come to some resolution, declaring the resolution of 1692 to be *a bar* to the present claim, which is not supported by any additional evidence in its favor.

" Sir Jeffry Palmer, attorney general in 1661, appears, by the imperfect minutes preserved, to have acceded to the proposition, that the legitimacy of Nicholas was maintainable by law.

" I have looked back to the year, books, &c. and find nothing to confirm this opinion.

" The inquisition of sir Francis Knollys, the father of the earl of Banbury, seems to have been totally overlooked in 1661, and in the subsequent proceedings. It is now, for the first time, before the house. It recites a settlement (p. 169 of the printed minutes) of a great part of his estates, but particularly Caversham and Cholsey, to descend ' in the name and blood of Knollis.' This was in 1595; and the same anxiety was shown by William his son, in 1606, upon his marriage with lady Elizabeth Howard (p. 7. of printed minutes). The settlement has these words, '*for the continuance of all and singular the manors, &c. in his name and blood;*" and the same lands of Caversham and Cholsey are covenanted to descend, in failure of heirs male of the body of him, William, then lord

Knollis, by lady Elizabeth Howard, *to the use and behoof of the heirs male of the body of sir Francis.* So that the inquisition and preceding settlement of 1595 must be looked at together, and at the same time with the settlement of 1606. Referring to the inquisition and former settlement, there was every motive in 1606 to see *what should be the future state of the family.*

" He might cut off the entail, but she could not.

" This settlement of 1606 appears to have been carefully concealed in 1661, and during the subsequent proceedings in this case;

" Yet it must have been produced to the jurors on their inquisition in 1633, for the crown, on whose behalf such inquisition was made, could draw out of the hands of parties the deeds affecting the interests of the crown.

" At the time of this inquisition, in 1633, the countess was already the wife of lord Vaux, being so described on the 2d of July, in the year preceding the date of it. She must have been privy to the inquisition, for the jurors find her living at Caversham; and the deeds to which they had recourse were necessarily in her custody. Why did she not produce the children Edward and Nicholas at that time when, protected by her second husband, she might have boldly avowed their birth?

" An annuity is directed in the patent, creating William earl of Banbury, to be paid out of the exchequer. — This annuity was never claimed by Nicholas; in short, all proceedings were studiously avoided in which the crown was immediately interested; for the truth must have come out, if such questions had arisen.

" The message to the lords in 1628 was the legitimate cause of all that happened afterwards. The earl acted up to the main declaration in that message; namely, *that he was childless,* not only in the conveyances of his property, in which he always treated himself as having *no issue,* but in his last will in which he makes *no provision for any.*

" This will must be considered in connection with the preceding conveyances of his estates.

" He sinks into the grave, having industriously stripped his supposed issue of all that property to which, under solemn settlements, they would have been entitled; — and this is the act of a man who had a high hereditary honor to transmit to his posterity!

" It has been asserted by those who have contended for the present claim that the second inquisition invalidated the finding of the first; but I must say, that without very strong legal grounds the second ought never to have been taken. — I will not go the length to say that a *traverse* or a *melius inquirendum* was absolutely indispensable; but it would have been decent to have proceeded upon some grounds legally impugning the validity of the first.

" If an inquisition be directed in one county and afterwards in another, as was frequently the case, the main findings must be the same, as to whether any issue left by the parties. *One cannot in this respect contradict the other without showing strong grounds for such contradiction.*"

His lordship here adverted to the law of inquisitions.

" The examinations of the witnesses in 1661, instead of proving *access* go to disprove it.

" Much better evidence might have been produced in 1661 — I mean the evidence of repute: there were six relations nearly allied to the claimant (if he was the person he stated himself to be), and among them three were maternal uncles then in the house; whose testimony would have been surely of greater value than that of the obscure witnesses who were then produced.

" The petitioner had prayed in 1692 to be tried as a peer. If he was a peer it was his right so to be tried; and it was a regular proceeding, nay, the duty of the house, to enquire into the merits of the petition. In consequence of this enquiry, they came to a resolution to dismiss the petition; and upon a reference to all the former proceedings before the house. The indictment pending against the petitioner having been removed by *certiorari* into the king's bench, he pleaded a misnomer in abatement. To this plea sir John Somers the then attorney general replied, that the petitioner

ought to answer to the indictment, for that the house had resolved that he was no peer. — To this replication the petitioner demurred; and sir Edward Ward, who in the mean time had become attorney general, seems to have joined in the demurrer. Lord Holt was of opinion that the replication did not avoid the plea, and quashed the indictment; most probably not upon the original question of right or no right to the peerage, but upon the insufficiency, according to his opinion, of the replication, which seemed to proceed upon a supposed original jurisdiction of the house in matters of peerage. This left the original question precisely in the situation in which it had stood before the investigation. The opinion of lord Holt does not seem to have been acceded to by the rest of the bench. See Skinner's Reports.

" If a writ of error had been argued, the questions growing out of it might have set the claim for ever at rest.

" The peers who in 1692 negatived the resolution, thought themselves so much bound by this proceeding, that they concurred, in 1697, in the address. The president of the council, lord Carmarthen (afterwards duke of Leeds), the marquis of Halifax, lord Mulgrave (afterwards marquis of Normandy), the earl of Marlborough, and lord Godolphin were dissentient to the resolution of 1692, yet held themselves bound by it in 1697, and went up with the address."

The lord chancellor, after recapitulating the leading points of the evidence for and against the claim, concluded by observing:

" If any lord shall vote for the claim, upon the ground that William earl of Banbury was married to the countess, and that therefore *pater est quem nuptiæ demonstrant*, he will vote upon mistaken grounds.

" If those who now exercise the functions of royalty think proper to create this worthy gentleman a peer, I know no reason against it; but for God's sake let not this house make peers!"

Upon a division the claim was rejected; twenty one peers having voted against it, and thirteen for it. And the committee resolved that the petitioner was not entitled to the title,

dignity, and honor of earl of Banbury; to which the house agreed.

Resolutions of the House of Peers.

§ 90. When the claimant has finished his case, and the attorney general has made his observations on it, the committee of privileges comes to a resolution; which is reported to the house, and if agreed to is communicated to the crown.

§ 91. Where the committee of privileges is satisfied that a claim has been fully made out, they resolve that the claimant appears to be entitled to the dignity; or that the barony in question is in abeyance between the coheirs of a certain person, and that the petitioner is one of those coheirs. But if the committee is not satisfied with the proofs produced in support of the claimant's pedigree, the usual resolution is, that the petitioner has not made out his claim to the dignity in question.

§ 92. In other cases the resolution is different. Thus in the case of the barony of Lumley, the house resolved that the petitioner had not any right to a writ of summons to parliament, as prayed by his petition. So in the case of the barony of Roos in 1805. The duke of Rutland having opposed the claim of lady Henry Fitzgerald to a coheirship in that barony, the committee resolved that his grace was not entitled to the barony claimed by the coheirs of Robert de Ros.

§ 93. There is one case in which the house of peers refused to come to any general resolution: this was in the claim of Mr. Villers to the dignity of viscount Purbeck, which has been already stated. There the house of peers having resolved that a fine levied to the king by a peer of the realm, of his title of honor, did not bar or extinguish such title; the main question was proposed, whether the petitioner had right, by law, to be admitted according to his claim. Then this question was put, whether the question should be then put; which was resolved in the negative.

A question was then put, whether the king should be petitioned to give leave that a bill might be brought in to disable the petitioner to claim the title of viscount Purbeck, which was resolved in the affirmative.

§ 94. The following protest was entered;—

"First—The lords being in judgment, as the highest court of England, in a cause referred to them by his majesty (and whereof they are the only proper judges) concerning the right of nobility claimed by a subject, that is under no forfeiture, and wherein their lordships had in part given judgment before, that he was not, nor could be barred thereof by a fine and surrender of his ancestor; it was, as we humbly conceive, against common right and justice, and the orders of this house, not to put the question that was propounded for determining the right.

"Secondly—The said claimant's right (the bar of the fine of his ancestor being removed) did, both at the hearing at the bar, and debate in the house, appear to us clear in fact and law, and above all objections.

"Thirdly—His said right was acknowledged even by those lords who therefore opposed the putting of the main question for adjudging thereof; and carried the previous question (that it should not be put), because in justice it must inevitably (if it had been put) have been carried in the affirmative, and his right thereby allowed.

"Fourthly—By the putting and carrying the third question, concerning leave to bring in a bill to bar him, his right to the said title is confessed; for he cannot be barred of any thing which he hath not right to; and this renders the proceedings in this cause contradictory and inconsistent.

"Fifthly—The petitioning the king to give leave for such a bill to be brought in, is to assist one subject, *videlicet*, the duke of Buckingham, against another, in point of right; wherein judges ought to be indifferent and impartial.

"Sixthly—This way of proceeding is unprecedented, against the law and common right, as we humbly conceive, after fair verdicts and judgments in inferior courts upon titles of lands, which have long been in peace, and vested in the claimer by descent, without writ of error brought, or appeal; to suffer the same to be shaken or drawn in question by a bill.

" Seventhly—This way by bill, in a case of nobility, is to admit the commons with us into judicature of peers.

" Eighthly—It is to make his majesty party in a private case, against a clear legal right; to anticipate and pre-engage his judgment, in a cause carried upon great division and difference of opinion in the house; and forestalls his majesty's royal power and prerogative, which ought to be free to assent or dissent to bills when they shall be tendered to him by both houses.

" Ninthly—After so many years delay, to give no answer to his majesty's reference, nor judgment in the claimer's cause, is a way in which the kings of this realm have not been heretofore treated, nor the subjects dealt with.

" Tenthly—We conceive this course in the arbitrariness of it against rules and judgments of law, to be derogatory from the justice of parliament; of evil example, and of dangerous consequence both to peers and commoners."

Journals, vol. xiii. 282.

The king refused his consent to the petition for bringing in a bill to disable Mr. Villers from claiming the title of viscount Purbeck; but he never was admitted to a seat in the house of peers.

Effect of such resolutions.

§ 95. The resolutions of the house of peers, in claims to dignities, upon a reference from the crown, are merely for the purpose of information, as appears from the manner in which such references are worded; nor can they be considered as judgments, in any sense of the word. And though the crown has generally acted in conformity to such resolutions, yet it is clearly not bound by them. The fact is, the supreme jurisdiction in peerage cases is, and has ever been deemed, part of the prerogative of the crown; and the authority of the lords to proceed in the investigation of these cases is derived therefrom. The usual language of the reference implies that it is made only for advice, or information, " How the same shall appear to their lordships;" in which there is nothing ever expressed or implied that can be construed into a waiver of this prerogative, on the part of the crown.

§ 96. Where the house of peers has entered into resolutions

of a general nature, as in the case of the barony of Grey of Ruthyn, respecting the alienation of dignities; and in that of the viscounty of Purbeck, respecting the surrender of dignities to the crown; they cannot be considered as having the force of laws. So the proceeding of the house of lords in the year 1694, respecting the descent of baronies by writ, which has been already stated, was irregular, as is said in the protest against; and if the resolution entered into by the house on that occasion, had not been assented to, and acted upon, by the crown it would have had no operation.

§ 97. It has been held by the court of king's bench, where a person claiming to be a peer was indicted for felony, and thereupon petitioned the house of lords to be tried by his peers, and the house resolved he was not a peer, that such resolution could not be pleaded there.

§ 98. Charles Knollys who claimed to be, and called himself, earl of Banbury, having killed a gentleman in a duel, was indicted in 1694, for murder, by the name of Charles Knollys, esq. This indictment was removed into the court of king's bench, where the earl pleaded that he ought not to be compelled to answer to this indictment, because king James I. by his letters patent created William viscount Wallingford earl of Banbury to him and the heirs male of his body, from whom it decended to him; and so he said that he was earl of Banbury, *et petit judicium*, if not being named so in the writ, he ought to be compelled to answer it.

Rex. v. Earl of Banbury. Skin. Rep. 517.

The attorney general replied, that the said Charles Knollys, by the name of Charles earl of Banbury, petitioned the lords spiritual and temporal in parliament, and showed that he was indicted, &c. and prayed to be tried by his peers. Upon which the peers resolved that the said Charles had not any right or title to the earldom of Banbury, and that his petition should be dismissed; and averred that this was, *secundum legem et consuetudinem parliamenti*; and so prayed that he should answer. To this replication the earl demurred, and the attorney general also.

Lord chief justice Holt delivered the judgment, and said:—

" That the plea being good, the replication had not avoided or answered it; for the defendant had made a good title to the earldom, the which was not avoided by the replication. First, because the replication did not shew any determination in parliament. Secondly, this was an original cause. Thirdly, no judgment was given. Fourthly, they never had the cause before them.

" First.—This was not any determination, for it being by the lords spiritual and temporal, this was not a determination in parliament; for the parliament consisted of the king, the lords spiritual and temporal, and the commons. So that the king being part of the parliament, nothing might be done there, as a parliament, where the king was excluded. And this judgment being pleaded as by the lords spiritual and temporal, without mention of the king, it was with an exclusion; for it being by the lords spiritual and temporal only, as it was pleaded, the king of necessity was excluded. And this was contrary to all the entries of judgments in parliament; for every one knew that the lords of parliament had a double capacity, scil. as an house, when they deliberate and consult and vote, in matters before them, in the way of legislature, or matters of privilege; and when they proceed as a court in a judicial manner, for rectifying of the errors of inferior courts. And as a court, all that they did was by the authority of the king, and the style ought to be, *coram rege in parliamento*, or *ad parliamentum*, &c. as Ryley's Placita Parliamentaria, Cotton's Records, &c. And any such judgment as this, by the lords spiritual and temporal, was never seen; and no precedent of such a thing could be produced; for the king was the fountain of justice, and no man might proceed in the administration of it, but in his name or under his authority. And therefore in the king's bench the judgment was not, *consideratum est per justiciario*; for if it was so, it would be void; yet the judgment was actually given by them. But it was *consideratum est per curiam*, in which the king was always present, and the judgment was virtually and in law his judgment. So the lords spiritual and temporal gave the judgment; but it was not their judgment,

but the judgment was, *per curiam parliamenti, coram domino rege.*

" Secondly. — This was an original cause of which they had not conusance, and therefore the proceedings were *coram non judice.* For a thing was as well out of the jurisdiction of a court, where it came there before its time, as where it was beneath it. And therefore if a cause came into B. R. by a writ of false judgment, and they proceed upon it, their proceedings are void, *et coram non judice.* And if a writ of error be brought in parliament upon a judgment in C. B., the proceedings in parliament would be void. And this has been often so ruled, and very lately in the case of the earl of Macclesfield; who having brought an action of *scandalum magnatum* in the exchequer, he after brought a writ of error in parliament; and the matter being examined, and the court ready to give judgment, it was objected that the cause came there *per saltum*, for there ought to have been a writ of error in the exchequer chamber, upon the statute of 31 Edward III., before that they came into parliament; and upon this the court heard counsel, and the matter was debated, and after deliberation upon it the court desisted.

" Also they had not jurisdiction of the original cause, for another reason, scil. they were the most supreme court, and employed, *circa ardua regni;* and they ought not to be troubled with little causes, but only upon necessity, where a failure of justice was in the inferior courts. For all causes generally consisted more of matters of fact than of law, and it was beneath the dignity of their lordships to be troubled with matters of fact. This was not that the law did not deem that their lordships were able to examine matters of fact but that another way more fit was appointed to be used in this case, the which was by a jury, whom the law intends to be conusant of the truth of the matter; and therefore the law requires that they come out of the neighbourhood, and not only so, but out of the vill; because *vicini vicinorum facta scire præsumuntur.* But their lordships were in a superior orb, and the law did not presume that they were so well informed of these matters; and therefore if a writ of error was

brought in parliament, in which there was error in fact, this should not be tried in parliament, but in B. R. And for what reason; — because the lords in parliament cannot try a matter of fact; and therefore the court of B. R. for the necessity of the matter shall reverse their error in fact themselves. But if error in fact be in C. B., and a writ of error be upon this brought in B. R., this error in fact shall be reversed in B. R.

" Also the lords in parliament are the dernier resort, and are to redress the errors of all other courts; and therefore a cause shall not come there in the first instance, for this would deprive the party of his remedy, by way of appeal, or writ of error. And it is the wisdom of this nation, and as he believed, of all nations, to give to the party an appeal, and not to conclude his right upon the first trial.

" Thirdly.—The lords had not given any judgment on this case; for it was only that he had not a right to the earldom of Banbury; the which was but an opinion, and no judgment. In courts of equity, it was true, the dismission of the bill was the determination of the cause; but in a proceeding at law, if a court declared that the party had not a right to recover, or said that the defendant *est sine die*, yet this was not a judgment against the plaintiff; but such judgment would be erroneous, without saying, *nil capiat per billam*, 2 Cro. 284. And so in a *quo warranto*, it was not sufficient to adjudge that the party had not a right to a thing which he had usurped; but he ought to be concluded from it by a judgment.

" Fourthly. — The lords had not any cause before them. This was only a petition of the earl to be tried by his peers; the which was a matter of privilege, of which they had conusance; but the right of earldom never was before them, or submitted to their judgment. He as earl of Banbury petitioned, as a member of the body of the peers of England, and being under an accusation for a crime, to be tried by his peers. This petition asserted him to be an earl; he did not put that question before them, and therefore their sentence was more than they had before them to determine. He did not demand if he was an earl or no, he supposed it by his

petition; and the title to the earldom was not brought in judgment before them; and therefore their *adjudicatum est*, *consideratum est*, *et ordinatum est*, was not founded upon any matter submitted to their conusance, but totally beyond the demand of the petition. He demanded to be tried by his peers, and asserted himself to be a peer; and they answered that he had not a right to the earldom of Banbury; the which was a thing out of the petition, and of which the lords had not any jurisdiction.

" The earldom of Banbury was an inheritance, and the inheritances of the peers in their honors were determinable by the same law, and in the same manner, as those in their lands; and the lords had not, nor ever had any right to determine them; and the counsel for the king had not produced, and, he supposed, could not produce any instance where the peers had determined of such a matter. He admitted that they had determined matters of privilege and precedence between their members; but the right of inheritance of a peer never was determined by the lords, but was determinable according to the course of the common law, as all other inheritances were. And the case of lord Willoughby in Jones, 96. was upon a reference by the king; for the way was, for a peer to sue to the king by a petition, the which was a petition of right, and upon this the king, *if the party submitted to his determination*, referred it to the lords, who examine it, and make their report to the king, and upon their report the king makes a determination. But if the party does not submit the matter to the king, or does not abide by his determination, then the king ought to indorse his petition with a *soit droit fait*, and send it into chancery; and it being there, a commission ought to issue to examine the matter of the petition; and this being found, then the attorney general ought either to traverse the matter or demur, and if he traverse, it ought to be sent into B. R. and tried there. Stanford's Prerogative, 72. And he said, that in all cases where the party has an injury by the king, he has his petition of right; so that the subject has his remedy in these cases by the common law of England, in an ordinary course,

Earldom of Oxford. ante, c. iv.

in the courts of the king; and they are not determinable before the lords in parliament, except when the party becomes remediless by default of justice in the inferior courts. And the lords have not one law to determine the right of their inheritance in their dignities, and another to determine their inheritance in their estates. But if the creation of their honor be in question, this ought to be tried by matter of record. If the derivation of this right be denied, scil. as if such was the ancestor of such, the which is a matter of fact, this shall be tried by a jury, as other matters of fact shall. And the king's counsel have not produced any precedent of a determination of a right of peerage by the lords; the which they would have done, he supposed, if there were any such precedent. And that which never had been done, he supposed, could not be done.

" And having spoken upon the four points which he considered, upon the replication, he proceeded to consider the allegation, that this judgment was *secundum legem et consuetudinem;* and as to this, he said that he did not know any reason for this allegation, which the king's counsel had inserted, if it was not to frighten the judges. But he said that he did not regard it, for though he had all respect and deference for that honorable body, yet he sat there to administer justice according to the law of the land, and according to this oath; and that he ought not to regard any thing but the discharge of his duty. And as to the law and custom of parliament for the determination of inheritances, he knew not any but the common law of England, the which is the birthright of every Englishman; and he would be glad to be satisfied by any man, if there be any such custom and law of parliament, where it is. For a custom ought to consist in usage; and he desired to see the precedents of such judgments. And as to the law of parliament he did not know of any such law; and every law which binds the subjects of this realm, ought to be either the common law and usage of the realm, or act of parliament. — *Nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum, aut per legem terræ.* And therefore the earl of Banbury cannot be

ousted of his dignity but by attainder or act of parliament, or judgment in a *scire facias*, upon his patent. But if there was any such law and custom of parliament, the which Mr. attorney said was, *inter arcana imperii*, which is a strange notion of law, though it may be good in politics, and for which the lords would not thank him, when they considered that the law which governs the inheritance of their dignities is, *inter arcana*; for *misera est servitus ubi jus est vagum et incertum*; yet when this comes incidentally in question before them, they ought to adjudge and intermeddle with it, and they adjudge things of as high nature every day, for they construe and expound acts of parliament, and adjudge them to be void; they discharge men committed by parliament, upon a prorogation, they adjudge of privilege of parliament."

The indictment was abated.

§ 100. At the end of lord chief justice Raymond's report of this case is following passage: "Note — That this judgment was very distasteful to some lords; and therefore (Hilary Term, 1697, 9 W. 3.) the lord chief justice Holt was summoned to give his reasons of this judgment to the house of peers, and a committee was appointed to hear and report them to the house, of which the earl of Rochester was chairman. But the chief justice Holt refused to give them, in so extrajudicial a manner. But he said, that if the record was removed before the peers by error, so that it came judicially before them, he would give his reasons very willingly; but if he gave them in this case, it would be of very ill consequence to all judges hereafter, in all cases."

Not generally conclusive in any case.

§ 101. The resolutions of the lords, in cases of peerage, referred to them by the crown, are either upon matters of fact, or matters of law. In the first case, the resolution is merely that the petitioner has not made out his claim, so that he is not thereby precluded from renewing it again and again, if he can discover additional evidence in its support. In the second case, the house has frequently adjudged and resolved that the petitioner had no right to the dignity claimed. But still resolutions of this latter kind are not final and conclusive; for the king, in whom the entire jurisdiction over dignities is

placed, may refer the case again to the house of peers, or elsewhere; and may ultimately act according to his own discretion, in assenting or not, to their resolutions; and there are some instances where the crown has granted a second reference, upon which the lords have come to a resolution directly contrary to their former one.

§ 102. Thus it has been stated, that in the case of the barony of Willoughby de Broke, the house of lords, proceeding upon a reference from the crown, resolved that the petitioner had no right to that dignity; upon the principle that where a barony by writ descended to coheirs, it was in the power of the crown to hold the same in suspense or abeyance, or to extinguish it. But the house having soon after resolved, that if a person summoned to parliament, and sitting, died, leaving issue two or more daughters, who all died, one of them only leaving issue, such issue had a right to demand a summons to parliament. The king referred the case again to the house, where it was resolved, after a long debate, that the petitioner should be heard upon the new matter. The protest against this resolution has been already stated, in which it was said, that it would tend infinitely to prejudice the judicature of the house, if the lords should permit judgments once given to be reviewed. But this reasoning is fallacious; for in cases of this kind, the lords have no judicature, and do not pronounce any judgment, but only certify their opinion to the king. The resolution of the lords upon the second reference was directly contrary to their former one.

Ante, ch. v.

§ 103. It has been stated, that in the year 1711, the house of lords resolved, but without any reference from the king, that the crown could not, after the union with Scotland, confer an English dignity on a peer of Scotland; and upon that ground refused to admit the duke of Hamilton, who had been created duke of Brandon, in England, to take his seat in the house by this latter title. In the year 1719, the house, upon a reference from the crown, resolved that the earl of Solloway, on whose father the English dukedom of Dover had been conferred, and who had sat by that title, had no right to a writ of summons, as duke of Dover; upon the same principle

upon which they had refused to admit the duke of Brandon. But in 1782, the claim of Douglas, duke of Hamilton, the great grandson and heir male of the body of the duke of Hamilton, whose claim was rejected in 1711, having been referred to the lords, the house, after consulting the judges, resolved that the claimant was entitled to the dukedom, in direct contradiction to their former resolutions.

It was argued by one of the counsel in this last claim, that there was a great distinction between the case of a judgment pronounced by the house of lords on an appeal to them, or on a writ of error, brought in the ordinary course of the administration of justice, and the case of an original application to the crown, referred to the lords for their consideration and advice; as, in the one case, the matter must have been discussed in the courts below, and before the house, on which several occasions it might justly be presumed that all evidence and argument had been exhausted, and that there must be an end to litigation; whereas, in the other case, there could be no hearing before any other tribunal; and unless the lords should themselves review their former adjudication, a peerage would stand distinguished from all other hereditaments, by being determinable without the possibility of revision, in any manner, and under any circumstances.

§ 104. The resolutions of the house of lords, in cases of peerage, referred to it by the crown, are however admitted by that house to be, *prima facie*, valid and conclusive, unless some ground is shown to the contrary.

§ 105. Thus in the case of the barony of Howard of Walden, in 1807, the counsel for the plaintiff produced the resolution of the house in 1784 upon the claim of sir John Griffin Griffin, that the barony was in abeyance; and argued, that that resolution was sufficient evidence of the barony having been originally created by writ; for if it had been a barony by letters patent, it could not be in abeyance. To this an objection was made by the earl of Suffolk, who was the heir male of the body of the first lord Howard of Walden, and by the duke of Norfolk, who said, that in the year 1784 a strong suspicion was entertained that the barony was originally

Ante, ch. v. § 70.

created by letters patent; and observed, that it would be very dangerous to presume that a barony was created by writ, merely because no patent could be discovered.

On the other side it was contended by the lord chancellor (Erskine) and lord Eldon, that the resolution of the house of peers in 1784 was in effect a determination that the barony was created by writ. That this determination was, *prima facie*, valid; and therefore, unless some ground was shown for reversing it, the house was bound to adhere to it.

Lord Redesdale was of opinon that the resolution in 1784 was only conclusive as far as it respected sir John Griffin Griffin, and his lineal descendants; but was not conclusive in favor of the then claimant.

On a subsequent day the duke of Norfolk said he had not been able to discover any evidence to prove that the barony had been created by letters patent; and the house resolved in favor of the claim.

§ 106. It has also been determined by the house of peers that the resolutions of that house, in cases of claims to peerages, upon a reference from the crown, do not bind strangers; and are not conclusive, as to other persons claiming the same dignity by a different title.

Borthwick barony, 1812.

§ 107. Henry Borthwick claimed, in 1762, the Scotch barony of Borthwick, stating that this dignity had descended lineally from father to son to John the ninth lord Borthwick, who dying without issue in the year 1672, the title thereby devolved on the heir male of Alexander Borthwick of Nenthorn, who was the second son of William the third lord Borthwick. That the claimant was the nearest and lawful heir male of the said John, ninth lord Borthwick, being descended from, and lineal heir male of the said Alexander Borthwick of Nenthorn. The committee of privileges resolved that the petitioner had a right to the title and dignity of lord Borthwick as heir male of the body of the first lord; and the house having concurred in this resolution, the dignity was adjudged to the claimant.

In 1808 Archibald Borthwick claimed the barony, stating that by the death of this Henry in 1772, without issue, he

was become the heir male of Alexander Borthwick of Nenthorn, and entitled to the barony.

An objection was made to this claim by John Borthwick of Crookston, who stated himself to be the heir male of the body of John Borthwick, the second son of the first lord Borthwick; and that he was in fact the real heir male of the first lord Borthwick; for that Alexander Borthwick of Nenthorn, the second son of William the third lord, was illegitimate, as appeared from a charter dated in 1489, by William lord Borthwick to the said Alexander, in which he is thus described, *dilecto filio meo naturali Alexandro Borthwick.*

The counsel for John Borthwick contended that Alexander Borthwick, being clearly described by the charter as an illegitimate person, it followed that Archibald Borthwick, who derived his descent through the said Alexander, could have no right to the dignity.

On the other side it was argued on behalf of Archibald Borthwick, that the resolution of the house of lords in 1762 was founded on the principle that the then claimant might deduce his descent through Alexander Borthwick; and therefore that fact could not now be controverted.

The earl of Radnor moved the following resolution: "That the committee ought not to receive any such evidence against the present claimant as calls in question the right of Henry the tenth lord Borthwick to the title, honor, and dignity of lord Borthwick; which was reported from the committee of privileges, and resolved and adjudged by the house."

It was argued by sir Samuel Romily, that a resolution of the committee of privileges, adopted by the house, was merely for the information of the crown, and was not a judicial decision. But even supposing it to have the effect of a judicial decision, it would, like all other judicial decisions, even a judgment in a writ of right, be only binding on the parties in the cause, and those who claimed through them. Proceedings of this kind were *ex parte*, which could never be decisive; and were in some respects similar to that of serving a person as heir, in the law of Scotland. That if the house had not proceeded with the greatest caution and jealousy in the late

Ante, c. v. case of the earldom of Berkeley, an illegitimate person would have been allowed to succeed to that dignity; and would have ousted the legitimate sons of the late earl.

That in the case of sir Richard Verney claiming the barony of Willoughby de Broke, the committee of privileges first resolved against him, that he had no right to a writ of summons. That the committee had come to this resolution, because they conceived the law to be, that where a baron by writ died leaving no son, and two or more daughters, the barony was extinguished. But the house of lords having soon after resolved, that, in such a case, if all the daughters died, one of them only leaving a child, that child or his heir would have a right to the barony; sir Richard Verney presented a new petition to the crown for the barony, which being referred to the house of lords, the committee of privileges resolved, in direct contradiction to their former resolution, that he had a right to a writ of summons, which was accordingly issued to him, by direction of the crown, and he thereby became baron Willoughby de Broke.

Ante, c. iv. § 100. That the case of Willoughby of Parham was not in point, for Thomas Willoughby did not sit under a resolution of the committee of privileges, but obtained a writ of summons from the lord chancellor, by representing himself to be the then heir to the barony.

That in the case of the duchy of Brandon the house of lords resolved in 1711, that no peer of Scotland could after the Union be created a peer of England, and upon that ground refused to admit the duke of Hamilton to take his seat, under a patent by which queen Ann had conferred on him the English honor of duke of Brandon. But in 1782, the house admitted his great grandson to take his seat, as duke of Brandon, under the same letters patent; in direct contradiction to their former resolution. The attorney general, (sir Thomas Plumer) spoke on the part of the crown. He said it could never be maintained that the resolution of the committee of privileges, adopted by the house in 1762, was decisive, not only as to the lineal descendants of Henry the tenth lord Borthwick, but also as to any new claimant, deriving title

from the same common ancestor, as to the whole of the pedigree, under which Henry Borthwick was reported heir in 1762. That whether a descendant of Henry could be ousted, was a very different question, but which did not arise here.

That claims to peerages differed materially from claims to lands; there possession was somewhere, and of sufficient importance to induce a claim. A peerage might be dormant for centuries, of which there were many instances. The proceedings before the house in claims to peerages were not, however, entirely *ex parte*, for the attorney general always attended on behalf of the crown; but he could only watch the proceedings, and seldom had the means of finding out that a false pedigree was stated. The descent of the claimant might be made out in an apparently clear and satisfactory manner, and yet many things might be suppressed.

That the proceedings in cases of this kind were only authorized by a reference from the crown, for without such reference the house had no jurisdiction, as appeared in the late case of the earldom of Banbury.

That cases of this kind were originally referred to the court of the high constable and earl marshal; and, in the reign of queen Elizabeth, had sometimes been referred to particular judges, and sometimes to the courts of law. That one of the first instances of a reference to the house of peers, was in the reign of king Charles I. who referred the claims to the earldom of Oxford to the house of peers; but that the words of that reference showed that the king might have referred it to other tribunals.

That the resolutions of the committee of privileges, and of the house were merely in the nature of information and advice to the crown, who might or might not adopt them.

That in the case of the barony of Howard of Walden, when claimed by Mr. Ellis in 1807, a question arose whether a resolution of the committee of privileges in a claim to the same barony, in 1784, was sufficient evidence that it was a barony by writ. Lord Erskine and lord Eldon were of opinion that the resolution of the committee of privileges was *prima facie* sufficient for that purpose; unless some ground was shown

Ante, § 70.

for invalidating it. And lord Redesdale was of opinion that it was conclusive so far as it respected sir John Griffin Griffin, and his descendants, but no farther.

That in cases of this kind the pedigrees are so long, and carried up to such remote periods, that errors and suppressions are extremely possible.

That even admitting the resolutions of the house to be similar to judgments, yet according to the doctrine laid down by lord chief justice de Grey, in the duchess of Kingston's case, judgments are only evidence against the parties, and all claiming under them; but are not, in general, to be used to the prejudice of strangers.

State Trials.

That judgments, in cases of peerage, were different from others in many respects; they were nearly *ex parte*, and no appeal lay from them.

That to set up a judgment as a bar to evidence was a thing unheard of, and it would be a monstrous doctrine to say that where a pedigree was received in one case, it could never be controverted in another case. That the present case was quite different from those that had been past: for here the person who was seated under the resolution of 1762, was dead without issue; and therefore that resolution could be no bar to evidence offered to controvert the evidence already received on the part of the claimant. The committee resolved that it was expedient to receive the instructions of the house, upon a matter of such importance.

The house resolved, "That the committee for privileges be instructed to permit the claimants of the title of Borthwick, whose petitions have been referred to this house by his majesty, to give evidence in support of their respective claims, though the same should controvert the pedigree produced by Henry lord Borthwick, in favor of whose rights, on the supposed truth of such pedigree, the house decided in 1762. As there is no lineal descendant of the said Henry now in being who can claim the benefit of such judgment. And as Archibald Borthwick, the only claimant who alleges a descent from Alexander Borthwick of Nenthorn, as the common ancestor of himself and of the said Henry lord Borthwick, has disquali-

fied himself from claiming the benefit of such judgment, by proposing to falsify the pedigree under which Henry lord Borthwick claimed and obtained it, without prejudice to any question that may arise concerning the effects of a previous judgment of the house in a case of peerage; if there existed claimants who had an interest in the judgment, or who had not so disqualified themselves."

§ 108. The author of this treatise having been consulted on the preceding case, wrote the following observations for the use of the attorney general: —

The crown appears to have originally enjoyed an unlimited power over the peerage, and to have not only summoned to parliament whom it pleased, but also to have omitted summoning the inferior barons at its discretion; nor will this appear extraordinary when it is considered that the crown exercised at that period a power nearly as extensive over the house of commons, by omitting to send writs to towns and boroughs that had sent representatives to parliament; and by sending writs to towns and boroughs that had never enjoyed such privilege.

The crown has also from the earliest times claimed and exercised a supreme jurisdiction in all cases respecting the right to peerages. For the mode of proceeding appears always to have been by petition to the king: and the court to which the crown usually referred such claims, was that of the high constable and earl marshal; from which an appeal lay to the king himself. Since the reign of king Charles I., the usual practice has been for the king to refer claims of peerage to the house of lords. It will therefore be necessary to consider: —

First. — Whether that house has any jurisdiction in cases of peerage, but by reference from the crown.

Secondly. — Whether such reference be discretionary in the crown.

Thirdly. — How far the crown is bound by the resolutions the house upon such references.

Fourthly. — Whether a person seated under a mistaken resolution of the house can be deprived of his dignity.

Fifthly. — Whether such mistaken resolutions, when assented to and acted upon by the crown, can bar the claim of the real owner.

Sixthly. — Whether the resolutions of the house are conclusive; and can be set up as a bar to evidence in another case.

With respect to the first of these questions, it is stated by lord Hale in his jurisdiction of the lords (p. 104.), that the house has no jurisdiction but by reference from the crown. — "And hitherto may be referred the cases of titles of honor, and precedence between the nobility: though regularly such cases come first to the king, and by reference from him to the lords."

In 1672, the house applied to the king for leave to hear the claim of James Percy to the dukedom of Northumberland; which being granted they then proceeded. — Journ. vol. xii. 553. 578.

In the reign of king William, Charles Knollys petitioned the lords, showing that he was indicted for murder, and being earl of Banbury, prayed to be tried by his peers. The house adjudged that the said Charles had not any right or title to the earldom of Banbury, and dismissed his petition.

This adjudication being pleaded by the attorney general in the court of king's bench, lord Holt rejected it; upon the ground that the house had no right to try a claim to peerage, but by reference from the crown. And in the late case of the earldom of Banbury the house acquiesced in the report of the attorney general (sir V. Gibbs), that the resolution of the house of peers in 1692, upon the petition of Charles Knollys was not a conclusive judgment.

With respect to the second question, although the first claim to a peerage of which we have any account is that of John Fitzallan to the earldom of Arundel, which commenced by a petition to the king in parliament (Rot. Parl. vol. iv. 441.), yet in the reign of queen Elizabeth claims of this kind were usually referred to the court of the high constable and earl marshal, sometimes to the judges; and the first case

that appears to have been referred to the house of peers was that of the barony of Abergavenny in the reign of king James I.; after which, however, several cases were referred to the commissioners for exercising the office of earl marshal.

A reference to the house of peers is only made where the claim appears dubious; for if the attorney general reports the case to be clear, the dignity is given immediately, and in three modern cases, namely, the marquisate of Winchester, the barony of Hastings, and the earldom of Huntingdon, where the attorney general reported in favor of the claims; the claimants received their writs of summons, and took their seats, without any reference to the house. Ante.

Where the attorney general reports against the claim, no reference is made.

In 1727, Charles Knollys presented a petition to king George II., claiming the earldom of Banbury, which was referred to the attorney general sir P. Yorke (afterwards lord Hardwicke) who reported against the claim, and no reference was made. Thus it appears that a reference of a claim of peerage to the house of lords is merely discretionary in the crown. Ante, p. 285.

Lord Holt has advanced a novel doctrine on this subject. He says that where a person sues the king by petition, it is a petition of right, and upon this the king, if the party submits to his determination refers it to the lords, who examine it, and make their report to the king; and upon this report the king makes a determination. But if the party does not submit the matter to the king, or does not abide by his determination, then the king ought to indorse his petition with a *soit droit fait* — and send it into chancery, and it being there, a commission ought to issue to examine the matter of the petition; and this being found, then the attorney general ought either to traverse the matter or demur. And if he traverse, it ought to be sent into the court of king's bench, and tried there.

It is sufficient to observe that this doctrine is not supported

by any authority; and that if it were allowed, the jurisdiction in claims to peerages would be taken from the crown, and transferred to the court of chancery, the court of king's bench and a jury.

With respect to the third question it does not appear from any authority that the crown is bound by the resolutions of the house of peers. The language of the reference only imports that it is made for the purpose of obtaining information and advice; nor is there an instance where the crown has used any words from which it can be implied that a right was given to the lords to judge and determine the case referred.

The conclusion of the reference in the great case of the earldom of Oxford is in these words: — "Therefore our pleasure is that their lordships call the competitors before them, and examine their titles, and certify us what they find, and their opinions thereof; whereupon we shall do that to either party which shall be just."

In modern references the words generally are "and to inform his majesty how the same shall appear to their lordships."

Suppose the house should resolve against a claim referred to them; and the king should notwithstanding issue a writ of summons to the claimant, by the name of the dignity claimed. The house could not refuse to admit the person so summoned to a seat, it being the undoubted prerogative of the crown to confer a peerage on any person not disabled by law. But as the lords have an undoubted jurisdiction as to the rank and precedence of peers, within their own house (4 Inst. 363.), they would be justified in refusing to admit the person so summoned to the seat claimed, against which they had resolved; and would only be bound to admit him as a new peer.

In the late case of the earl of Moira's receiving a writ of summons as baron Hastings, without any reference to the peers, the house would have been justified in referring the writ to the committee of privileges, to report where he should

be placed, and if that committee agreed with the report of the attorney general, that the earl of Moira was the heir general of the first lord Hastings summoned to parliament in 1 Edward IV., then the house would seat him in the place of the ancient barons of Hastings, if not he should be placed as the junior baron.

Suppose on the other hand that the house should resolve in favor of the claimant, and the king should refuse to issue a writ of summons to him: the only thing the house could do would be to remonstrate; and to resolve not to proceed to business till the house was full. There is a very ancient precedent of this practice; for Matthew Paris states that a parliament being held at Westminster in 1255, to which several peers were not summoned, the rest of the barons refused to answer the king's proposals, for this reason: *Quod omnes tunc temporis non fuerunt, juxta tenorem Magnæ Chartæ vocati: et ideo sine paribus suis tunc absentibus nullum voluerunt tunc responsum dare, vel auxilium concedere vel præstare.*

I am not aware of any instance in the journals where the peers have refused to proceed to business till their house was full: though there are some cases mentioned where the crown omitted to summon a peer. The principal of these is that of the earl of Bristol in the reign of king James I., Journ. vol. iii. 544., who complained by petition to the house that he had not received his writ of summons. This petition being referred to the committee of privileges, they reported that no precedent was found, that a writ of summons had been detained from any peer, that was capable of sitting in parliament; and that it would be necessary for the house to beseech his majesty to send a writ of summons to the petitioner. A writ of summons was sent accordingly.

With respect to the fourth question, it is certain that in many cases an act of the crown proceeding on a mistake may be revoked; upon the ground that the king was deceived in his grant. But in the printed case of the barony of Strange in 1737, where a writ of summons was issued by mistake, it is said, "The king's grant of nobility by writ of summons was not governed by any of the rules by which his gift of

lands was governed at the common law. The king's gift of lands was not good but by his letters patent; and by special words of grant. No inheritance passed from him without the word heirs, and if he was deceived in the motive which induced him to grant, his grant was void; and he might by his prerogative repeal it by *scire facias*. But if a commoner was once summoned to parliament, and sat, his blood was ennobled, and his title and dignity descended to his heirs; though the king's motive to summon him were merely personal; viz. to have his advice and counsel, though there were no words in the writ of summons from which the king's intention could be collected, to give to the person summoned the state, title and dignity of a baron; much less to expound it to an estate of inheritance. When the person summoned sat, the writ of summons had its full effect; and could not afterwards be avoided, or made not to have been. His creation into the state and dignity of a baron was by operation of law, in consequence of his once sitting, and did not depend on the king's intention, which it would be of dangerous consequence to be guessing at, after such a length of time."

The house of lords appears to have acquiesced in this reasoning; from which it follows that a person, seated under a mistaken resolution of the house, would acquire an indefeasible title: for the writ of summons must either have the effect of conferring on him the dignity claimed, or a new dignity of the same name.

Fortunately no case of this kind has occurred; the only instance where a person, having no right, was seated in the house by mistake, is that of Willoughby of Parham; in which however, Thomas the usurper was not seated under a resolution of the house; and yet it appears to have been clearly understood at that time, that there was no means of depriving him or his lineal descendants of the dignity. For the resolution in favor of the right heir is, without prejudice to the issue of Thomas the usurper, if he had left any, from which it may be concluded that the appearance of the real lord Willoughby, during the lifetime of Thomas, or any of his

descendants, would not have destroyed their right, under the writ of summons, issued by mistake, to Thomas.

With respect to the fifth question, no case of this kind has arisen. But it can scarcely be supposed that the issuing a writ of summons, under a mistaken resolution of the house, to a person, by the name of a dignity to which he was not entitled, and his being seated under that writ, would destroy the title of the real owner

If the real heir to the barony of Willoughby had claimed the dignity while the usurper or any of his descendants sat, and the house had reported in his favor, namely, that he was the true and next heir of the body of the first lord; could the crown, consistent with justice, have refused him a writ of summons? Certainly not. Upon presenting that writ to the house, it would be referred to the committee of privileges to determine where he was to be placed; and it is but reasonable to suppose that he would be placed in the seat of the ancient lord; and that the usurper would be deprived of his former seat and precedence, and placed according to the date of his writ of summons.

With respect to the sixth question, the resolutions of the house must in general be deemed final and conclusive on the claimant, and all those deriving their title through him; for the agreement of the claimant to the reference binds him to submit to the determination; otherwise the trial of his claim by the committee of privileges would be perfectly nugatory. For if the resolution was against him, he would renew his claim. If he did not, his son would; so that the matter could never be put to rest.

It is, however, observable, that the house has always been extremely cautious in wording its resolutions; for where the existence of the dignity is proved, but the descent of the claimant is not sufficiently made out, the usual resolution is, that the petitioner has not made out his claim to the dignity in question: so that he is not barred from a new application to the crown, whenever he thinks he can prove his pedigree. In other instances, however, the house has resolved, that the petitioner had no right to the dignity. And in this latter case

the crown would be justified in refusing a new reference, though not bound by it; for the king does not relinquish his inherent jurisdiction by consulting the house of lords, but may, if dissatisfied with their resolution, grant a new trial, by referring the matter again to the house, as in the case of the barony of Willoughby de Broke, in which the house resolved against the claim; but the principle of law upon which the resolution was founded, having been soon after discussed, and settled by the house to be contrary to what had been generally understood, another reference was granted, and the house came to a new resolution, directly contrary to the former one.

Another question has lately arisen in a peerage case, (Borthwick barony), namely, whether the resolutions of the house can be set up as a bar to evidence in another case, or rather whether the resolutions of the house are conclusive as to other persons claiming the same dignity, but not through or under the former claimant.

Now admitting the resolutions of the house to be similar to judgments pronounced in the courts of common law, yet they cannot have the effect of concluding persons who do not make title through or under the former claimant. For even judgments are only allowed as evidence against the parties, and all claiming under them, and cannot be used to the prejudice of strangers.

In all cases of peerage there is first a question of law, respecting the existence and nature of the dignity. And secondly, a question of fact, respecting the descent of the claimant.

In the case of Willoughby de Broke, the first resolution of the House, which was upon a point of law, was held not to be conclusive even against the claimant himself. And in the case of Howard of Walden, in 1807, lord Eldon and lord Erskine held, that a resolution of the house in 1784, upon a claim to that barony, by one of the coheirs, that the barony was originally created by writ, was *prima facie* valid, but not conclusive, as to the then claimant, who was the surviving heir. And lord Redesdale held, that it was only conclusive as far

as it respected the claimant, in 1784, and his descendants; but was not conclusive against a new person, claiming as another heir.

His lordship adverted to the case of the barony of Willoughby of Parham, and said, that if Thomas Willoughby, the usurper, had been seated under a resolution of the house, it would not have been generally conclusive; for if it had, the true heir to the title would have been absolutely barred, notwithstanding the failure of issue male of Thomas the usurper."

If the resolutions of the house in matters of law be not conclusive on strangers, their resolutions in matters of fact can never be deemed conclusive. If mistakes in matters of law are possible, mistakes in matters of fact are much more so. The pedigrees, in cases of this kind, are so long, and carried up to such remote times, that errors and suppressions are extremely possible. The proceeding is in a great measure *ex parte;* for though the attorney general always attends, on the part of the crown, yet he has in general no means of detecting the false statements that may be inserted in a long pedigree. The descent of the claimant may be made out in an apparently clear and satisfactory manner, and yet many things may be suppressed. It would therefore be an extraordinary doctrine to assert, that where a pedigree was received in one case, it should be conclusive in another.

If in the case of Willoughby of Parham, Thomas the usurper had been seated under a resolution of the house, would it not be an extraordinary doctrine to say that the right heir was thereby for ever barred from controverting any part of Thomas's pedigree, though notoriously false? On the contrary, might he not contend, according to every principle of law and justice, that not having been a party to that proceeding, he had no means of controverting the mis-statements upon which the resolution was founded, and therefore was not concluded by it?

If the resolutions of the peers could be set up by *them* in bar to a different claim to the same dignity, the crown would

thereby be prevented from rectifying any errors or mistakes which might be committed by the house, and the royal prerogative might thus be seriously affected; for the crown is in no case absolutely and finally bound by the resolutions of the house respecting claims to dignities.

THE END.

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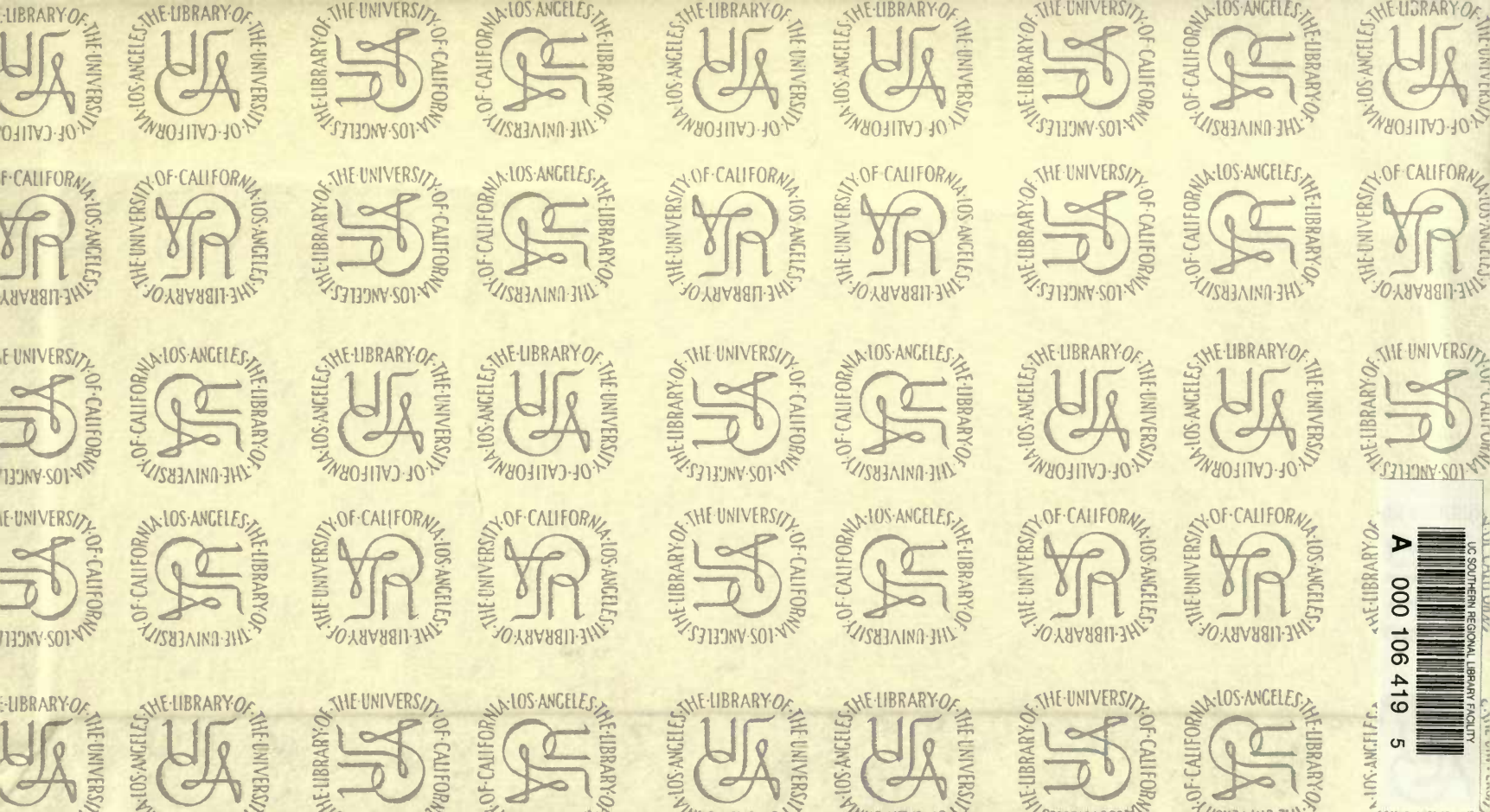

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